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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

20 Cr. 160 (MKV)

5 SETH FISHMAN,

6 Defendant.

Trial

7 -----x

New York, N.Y.
January 28, 2022
9:43 a.m.

9 Before:

10 HON. MARY KAY VYSKOCIL,

11 District Judge
12 -and a Jury-

13 APPEARANCES

14 DAMIAN WILLIAMS

United States Attorney for the
Southern District of New York

15 BY: ANDREW C. ADAMS

SARAH MORTAZAVI

16 ANDEN F. CHOW

Assistant United States Attorneys

17 SERCARZ & RIOPELLE, LLP

Attorneys for Defendant Fishman

18 BY: MAURICE H. SERCARZ

19 -and-

LAW OFFICE OF MARC FERNICH

20 BY: MARC A. FERNICH

21
22 ALSO PRESENT: KARLINE JUNG, Paralegal Specialist
23
24
25

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(Trial resumed; jury not present)

THE COURT: Good morning, everyone. Please be seated. All right. I've asked Ms. Dempsey to hold off bringing the jury up just so we can talk about a couple of issues. So, first, I have on the bench, I guess, Government Exhibit 9003? Oh, no, that's dealing with a different issue. I don't know why that is out of the binder.

Is there any report on the issue we were discussing at the close of the day yesterday with respect to the rules and regulations of the various states regarding gaming and horse rules and regulations, racing rules and regulations?

MS. MORTAZAVI: As of yesterday, your Honor, the defense has indicated they might be amenable to a factual stipulation. The government put language together and circulated it to defense counsel. They then took the position that they would not agree to the factual stipulation, and I don't know what their position is this morning. There was some indication that they may have a counterproposal but I later learned that they may simply object entirely.

So I'll leave it defense counsel to assert their position, but we have copies of the proposed factual stipulation, which it seems is moot, and the original stipulation that the government had proposed seeking just to move in the State regulations.

MR. FERNICH: Your Honor, and I appreciate

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1 Ms. Mortazavi's recitation, which is accurate, and I appreciate
2 their effort to draft a stipulation that would be mutually
3 agreeable. Unfortunately, it doesn't work for us.

4 So our position is that we would rest on the arguments
5 that we made yesterday. We don't think the reasons that I
6 stated, lack of notice, potential constructive amendment -- I'm
7 not going to belabor it. Your Honor understands the arguments.
8 It should have been charged the way Rojas was charged if they
9 wanted us to -- well, let me -- we object to the admissibility
10 of the regulations for the reasons that I stated yesterday.

11 If your Honor rules against us on that, we will sign
12 the stipulation presented to your Honor yesterday without
13 prejudice to the arguments that I've made that the regulations
14 should not be admitted at all.

15 THE COURT: All right. I am not admitting the
16 regulations but not for the reasons you've stated, Mr. Fernich.
17 I don't think it has anything to do with notice or constructive
18 amendment. There is no constructive amendment here. The
19 indictment clearly talks in, I think, the first paragraph,
20 certainly in the third paragraph and all throughout, about the
21 rules and regulations governing horseracing and the fact that
22 these drugs would enhance performance and potentially violate
23 the various rules and regulations.

24 You, yourself, have admitted that that allegation is
25 relevant to the intent issue in the case, and you've been on

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1 notice of that, or at least your client and your predecessor
2 counsel have been on notice of that, since day one. So it is
3 not a notice issue. It is not a constructive amendment issue
4 in --

5 MR. FERNICH: 403 issue.

6 THE COURT: -- in the Court's mind. It is also not a
7 403 issue. I don't believe it's unduly prejudicial, if that's
8 what you mean.

9 MR. FERNICH: No, more like confusing and misleading.

10 THE COURT: So I do agree -- I spent a lot of time
11 thinking about this and looking at what you're proposing to put
12 into evidence, Ms. Mortazavi. Jurors don't get a copy of the
13 statute under which the defendant is charged. To now try to
14 give them a copy of rules and regulations under which he isn't
15 charged just complicates and confuses things.

16 And you did have an opportunity, and you do have an
17 opportunity, to argue, and you certainly elicited evidence
18 about the fact that various jurisdictions have rules and
19 regulations that govern the conduct of horseracing and that the
20 intent of these drugs was to enhance performance, which would
21 violate allegedly certain of these rules and regulations.

22 But the jurors don't need the text of the actual rules
23 and regulations, and I am not going to admit them into
24 evidence.

25 MS. MORTAZAVI: We understand, your Honor, and we'll

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1 rely on the evidence that has been elicited so far.

2 THE COURT: Okay. So let me put this binder away
3 because that's a bulky issue.

4 I did receive this morning a copy of four additional
5 proposed instructions from Mr. Fernich. I don't know if the
6 government has even had a chance to look at them, but we should
7 talk at a break about timing and sequencing of things here.

8 It had been my intent to do the charging conference
9 and to go into summations today, if time allowed. Now, with
10 these last-minute requested additional instructions, there are
11 things that we need to talk about.

12 One of the proposed instructions is that I charge --
13 well, I'm not going to go into too much detail. We'll talk
14 about it at the charging conference.

15 Mr. Fernich, I think you completely misapprehend what
16 the Rojas case and decision is about, and we'll talk about
17 that. It dealt with a vet who administered the drugs him or
18 herself, which, to my knowledge, there's no allegation of that
19 here.

20 MR. FERNICH: No, I'll amplify --

21 THE COURT: Right. We'll deal with it at the charging
22 conference, but I'm giving you a heads up.

23 With respect to the lesser-included offense charge,
24 I'm giving the government a heads up that I need to hear from
25 you with some legal authority on this issue. All right?

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1 MR. ADAMS: All right.

2 THE COURT: All right. So I don't want to keep the
3 jurors waiting. What we're probably going to have to end up
4 doing is -- well, let's see how the morning goes, but it may
5 well be that we let the jurors go home early today, we do the
6 charging conference, and then you come back Monday and do
7 summations and then charging. It had been my hope to move into
8 summations.

9 MR. FERNICH: Judge, I didn't mean to sandbag anybody.
10 The evidence was coming in even at the end of the day.

11 THE COURT: No, I understand.

12 MR. FERNICH: It impacts -- I've been working on
13 this --

14 THE COURT: I've seen you working on it. I thought
15 you were working on your appeal throughout the whole trial.
16 You're certainly working on something.

17 MR. FERNICH: I'm working, but stuff comes in and I --

18 THE COURT: Well, you know, the purpose, by the way,
19 of the Court signing the order allowing electronic devices in
20 the courtroom was to assist in your defense in this case, not
21 for you to be conducting all your other business while --

22 MR. FERNICH: Oh, no, I'm working on exactly what we
23 discussed, your Honor.

24 THE COURT: Okay.

25 MR. ADAMS: And, your Honor, with respect to the

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1 Court's proposal on timing, the government had a preliminary
2 opportunity to look at Mr. Fernich's filing, and I expect that
3 we'll be well in hand to have a charging conference this
4 afternoon, if it works for the Court.

5 THE COURT: Oh, we're clearly having the conference
6 this afternoon.

7 MR. ADAMS: There's no problem with the timing in that
8 respect, and then given the blizzard, in any event, I think the
9 parties are jointly going to propose --

10 THE COURT: The parties what?

11 MR. ADAMS: We were going to jointly propose to come
12 back for summations on Monday.

13 THE COURT: Is that your preference, Mr. Sercarz?

14 MR. SERCARZ: Agreed. That's mine as well.

15 THE COURT: All right. From what the weather reports
16 is saying, this is not the blizzard. This is the storm before
17 the storm, which may be a non-event, but in any event, all
18 right.

19 So today I see you have the physical evidence that we
20 talked about. All right. So where are we at, in terms of you
21 have, is it, Mr. Concannon that you said?

22 MR. ADAMS: It is, your Honor, and he will be the
23 final witness. We have a few calls to play, a few additional
24 pieces of evidence to move in, and a few clarifications for the
25 record that Mr. Chow will take care of.

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1 THE COURT: Yes.

2 MR. SERCARZ: Initially, your Honor, so things will
3 run more smoothly, when the jury does come up, the government
4 is proposing a stipulation that -- withdrawn.

5 The government is proposing to introduce evidence that
6 they feel they will need in order to demonstrate that the
7 enhancement is appropriate for conduct that occurs after the
8 defendant has been arrested and charged with a crime.

9 They have offered me the appearance bond and the
10 docket sheets that reflect the dates of the defendant's arrest
11 and removal. I'm concerned that there is extraneous and
12 distracting information in the appearance bond, for example,
13 the amount of the bond, the fact that the defendant's father
14 was involved in posting it.

15 My preference would be a stipulation regarding the
16 date of the arrest, the date of the defendant's release on
17 bond, and that ought to be adequate for purposes of allowing
18 the government to offer their evidence regarding the
19 enhancement and whether or not it's applicable. So perhaps if
20 we can do it that way, we can draft a stipulation and have it
21 signed, your Honor, at some point before we have to argue
22 before the jury.

23 MR. ADAMS: There is no problem with a draft actual
24 stipulation. We just need time to draft it. This has been a
25 document that we produced some time ago, after a proposed

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1 redaction previously. If we get them now, we'll take care of
2 it.

3 THE COURT: All right. But you need to do it before
4 you rest.

5 MR. ADAMS: Correct. We will.

6 MS. MORTAZAVI: That's correct, your Honor, and I
7 believe we were going to introduce it through Special Agent
8 Concannon.

9 THE COURT: Why don't I let you all get to that. I'm
10 going to make one other observation. I spent a lot of time
11 last night working through the jury charges, which, obviously,
12 will have to be amended to reflect the fact that Ms. Giannelli
13 is not here. But in addition, I saw nothing about this
14 enhancement argument in what you gave me.

15 MR. FERNICH: Judge, in the government's defense,
16 there was something about it I think in the special verdict
17 form that we submitted, the draft verdict form, which may need
18 some further work.

19 THE COURT: It will, obviously, since Ms. Giannelli
20 isn't here.

21 MR. FERNICH: Right. I think there was a question
22 that the government put in there, that somebody put in there,
23 about whether any conduct had been proved after the arrest
24 date.

25 THE COURT: Nope, not that I recall.

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1 MS. MORTAZAVI: I thought, your Honor, that that was
2 in there.

3 MR. FERNICH: I thought the government had put it in
4 there.

5 MR. ADAMS: We'll confirm. If it's not, we'll
6 certainly propose a brief instruction.

7 THE COURT: All right. I mean, that's something that
8 we can talk about at the charging conference. We don't really
9 need to deal with that, but you do need to talk to each other
10 about the stipulation. Why you go ahead and do that.

11 MR. ADAMS: And your Honor, since we're not with the
12 jury, I'd ask permission for me to step out, I'll go draft that
13 now, and we can proceed with Ms. Mortazavi and Mr. Chow.

14 THE COURT: But how are you going to proceed if you
15 haven't had time to talk with Mr. Sercarz if you're intending
16 to do this during Mr. Concannon's testimony?

17 MR. ADAMS: If we come to the morning break, I'm
18 relatively confident we'll be able to come to a factual
19 stipulation. We're talking about merely the fact that he was
20 arrested and released on bond.

21 MS. MORTAZAVI: Your Honor, what Mr. Chow has proposed
22 is that we handwrite it right now.

23 THE COURT: That's what I was thinking you were going
24 to do.

25 MR. CHOW: If your Honor would indulge us with five

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1 minutes, we'll draft it and sign it.

2 THE COURT: I thought that's what you were going to
3 do. I'd rather get the jury here and just go through and not
4 have an up and down, up and down. If we had the jury here in
5 the back in the normal way, then it would be fine.

6 So why don't you take a couple of minutes. You can
7 let us know when you're ready, and we'll tell Ms. Dempsey it's
8 okay to bring the jury up. Okay?

9 MR. ADAMS: Thank you, your Honor.

10 THE COURT: So I am going to leave you to that, and I
11 need to go retrieve something anyway.

12 MR. ADAMS: Thank you.

13 THE COURT: All right. Thank you.

14 (Recess)

15 Please be seated. The jurors are on their way. I
16 understand you have finalized what you needed to do with regard
17 to the stipulation?

18 MR. CHOW: Yes, your Honor.

19 THE COURT: All right. Thank you.

20 All right. And, Mr. Chow, are you taking the lead
21 this morning?

22 MR. CHOW: I am.

23 THE COURT: Okay. Thank you.

24 (Pause)

25 Back on the record. While we're waiting, please don't

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1 forget to do what you all expect to do with respect to
2 Mr. Cohen. We talked about whether you're going to apply to
3 unseal the record, or how you're going to leave it; so just
4 don't forget that. Okay?

5 MS. MORTAZAVI: Yes, your Honor.

6 MR. ADAMS: Yes, your Honor.

7 (Pause)

8 (Jury present)

9 THE COURT: Please be seated, everyone. All right.
10 Good morning, ladies and gentlemen, and thank you again for
11 your punctuality and also for your patience. I know we've kept
12 you a little bit this morning past when I told you we were
13 ready to start. The reason that we're a bit delayed is that
14 the lawyers and I did spend some time talking about some legal
15 issues in the hopes that we can streamline things a little bit.

16 We're going to try to move things along. It's our
17 hope that we may be able to conclude early today. We are
18 positively ahead of the schedule that I told you about for the
19 case, and I'll tell you more about scheduling and where we're
20 at later on in the morning. Okay?

21 All right. So we're going to continue with the
22 government's case. Mr. Chow, your next witness?

23 MR. CHOW: Yes, your Honor. The government calls
24 Special Agent Jarrett Concannon.

25 THE COURT: Good morning, Mr. Concannon. You can

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1 remove your mask, but please remain standing so Ms. Dempsey can
2 administer the oath.

3 JARRETT CONCANNON,

4 called as a witness by the Government,

5 having been duly sworn, testified as follows:

6 THE DEPUTY CLERK: Thank you. Please be seated, and
7 say and spell your name for the record.

8 THE WITNESS: Special Agent Jarrett Concannon,
9 J-a-r-r-e-t-t, C-o-n-c-a-n-n-o-n.

10 THE COURT: Thank you. Mr. Chow.

11 DIRECT EXAMINATION

12 BY MR. CHOW:

13 Q. Good morning. Where do you work?

14 A. I work at the Federal Bureau of Investigation.

15 Q. What's your position at the Federal Bureau of
16 Investigation?

17 A. I'm a special agent.

18 Q. How long have you been with the FBI?

19 A. Approximately 18 months.

20 MR. CHOW: Your Honor, with the Court's permission,
21 we'd like to publish certain exhibits that have been entered
22 into evidence, in particular, the boxes and bins that have been
23 placed on the table.

24 THE COURT: You may.

25 MR. CHOW: And also with the Court's permission, I'm

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1 going to have a couple of my colleagues assist me in publishing
2 some of the exhibits so that I don't have to keep walking back
3 and forth between podium and the table.

4 THE COURT: That's fine because, otherwise, you have
5 to keep taking your mask on and off.

6 MR. CHOW: Exactly.

7 THE COURT: That's fine.

8 MR. CHOW: Ms. Mortazavi, could you bring me one item
9 from Government Exhibit 9080, which is a bin that has been
10 labeled with the label NB 5.50.

11 THE COURT: And these exhibits are all in evidence?

12 MR. CHOW: They have all been admitted as evidence,
13 your Honor.

14 THE COURT: Pursuant to some of the stipulations we've
15 dealt with earlier?

16 MR. CHOW: Pursuant to stipulation 9015.

17 THE COURT: Thank you.

18 BY MR. CHOW:

19 Q. Special Agent Concannon, can you read the label assigned
20 this vial?

21 A. "NBO5.50."

22 Q. Ms. Mortazavi, could we bring a vial from bin 9079, which
23 is labeled "NB5.30."

24 And for the record, your Honor, these were all
25 admitted pursuant to stipulation 9015, as I mentioned, as a

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1 result of the search of Equestology's offices.

2 THE COURT: All right. And everything on the table
3 and below the table is --

4 MR. CHOW: From the same search.

5 THE COURT: -- from that search?

6 MR. CHOW: From that search, yes, your Honor.

7 While she's opening that one, why don't we jump to the
8 next one, which is Government Exhibit 9072, which is a box that
9 has label EMP/BB3 on it.

10 THE COURT: And I'm sorry, Mr. Chow, remind us of the
11 date of the search. Is that in the stipulation?

12 MR. CHOW: Yes, it is. This search occurred on
13 October 28th, 2019.

14 THE COURT: Thank you.

15 MR. CHOW: All right. We're going to go back to one
16 of the vials from Government Exhibit 9079, which had a label on
17 it, NB5.3.0 -- sorry, 5.30.

18 BY MR. CHOW:

19 Q. Special Agent Concannon, can you read the label on this
20 vial?

21 A. "NBN5.30."

22 Q. Going back to Government Exhibit 9072, this was a bin that
23 had a label on it EMP/BB3.

24 Special Agent Concannon, is there any label on this
25 vial?

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1 A. There is not.

2 Q. Ms. Mortazavi, could we take one of the vials from the
3 Government Exhibit 9064, which has a label BPR DOM12.1.

4 Special Agent Concannon, is there any label on this?

5 A. There is not.

6 Q. All right. Ms. Mortazavi, can we take out from Government
7 Exhibit 9083 the following items -- that's the box on the far
8 left -- labels VO2 Max, BH Bleeder, Serenity and IT Plus,
9 please.

10 Special Agent Concannon, can you read the name of this
11 product as according to this label?

12 A. It's VO2 Max.

13 Q. Where it says "Directions," could you read that to the
14 jury, please?

15 A. "Administer intravenously 10 cc's, four to six hours prior
16 to strenuous exercise."

17 Q. And under "Ingredients" would you read that?

18 A. "Proprietary blend of amino acids."

19 Q. On the left-hand side of the label, could you describe what
20 insignia appears?

21 A. It's a horse, horse's head.

22 Q. Great. Going to the next label, can you read the first
23 line of the label on the top?

24 A. "Serenity."

25 Q. And read what it says under "Directions"?

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1 A. "Give five to ten cc's IV 24 hours and four hours before
2 stressful event."

3 Q. Can you read what it says under "Ingredients"?

4 A. "Proprietary sugars and amino acid blend."

5 Q. On the left-hand side of the label, can you describe what
6 you see?

7 A. It's the same horse head as the previous label with the
8 words "Equi-Tech" underneath.

9 Q. All right. Going to the next label. Can you read the
10 first line on the right-hand side of the label?

11 A. "HP Bleeder Plus."

12 Q. And under that, what does it say?

13 A. "Homeopathic bleeder and analgesic."

14 Q. Under "Directions" what does it say?

15 A. "Administer 10 cc IV or IM five to six hours before
16 exercise. This product contains no known testable
17 ingredients."

18 Q. And under "Ingredients"?

19 A. "Proprietary blend of homeopathic and complex amino acid
20 structures."

21 Q. On the left-hand side of the label, are you able to make
22 out any letters or words?

23 A. "SPC, Specialized Performance Compounds."

24 Q. All right. Going to the next label. Can you read what it
25 says on the top line there?

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1 A. "IT Plus."

2 Q. And under "Directions" can you read what it says?

3 A. "Reconstitute with 30-milliliters bacteriostatic water and
4 administer 15-milliliters 24 hours and four hours before
5 exercise."

6 Q. Thank you. From Government Exhibit 9082, can we pull out
7 the folders that have been labeled for Homeopathic Bleeder
8 Paste, DPM, Geoff Vernon, TB-7 and MPX.

9 All right. Let's start with the bleeder paste folder.
10 All right. Special Agent Concannon, can you read the top of
11 this label?

12 A. "Homeopathic bleeder and analgesic."

13 Q. And on the left-hand side, is there an emblem?

14 A. It is. It's a horse's head. It says "Equi-Tech"
15 underneath.

16 Q. And in red font, what does it say?

17 A. "Oral paste."

18 Q. Under "Directions" could you read that?

19 A. "Administer five cc's per 100 kilograms body weight six to
20 eight hours before exercise. For intense bleeders, administer
21 a loading dose 24 hours before exercise."

22 Q. And under "Ingredients" what does it say?

23 A. "Proprietary blend of natural extracts."

24 Q. All right. Can we bring up the EPM folder, please.

25 All right. Can you read the first line of this label?

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1 A. "EPM Double Kill."

2 Q. And under that, what does it say?

3 A. "Toltrazuril and diclazuril oral paste."

4 Q. On the left-hand side, is there an insignia?

5 A. There is. It's the horse's head.

6 Q. What does it say under "Directions"?

7 A. "Give half a tube and repeat in two weeks. Best results
8 when administered in lower doses more frequently, as this is a
9 one month supply."

10 Q. And in the white text on the right-hand side underneath
11 that, what does it say?

12 A. "60 cc multiple-dose syringe."

13 Q. All right. Going to the next folder, can we show the Geoff
14 Vernon folder, please. Okay. And flipping inside, can we go
15 to the TB-7. Great.

16 Special Agent Concannon, can you read starting from
17 the top?

18 A. "TB-7. Acetylated Thymosin B4 and B10. Directions:
19 Reconstitute with three milliliters saline and administer
20 either IV, IM or SQ. Best results when used post event and
21 five to seven days prior to event."

22 Q. In red text what does it say there?

23 A. "For R and D and clinical trial use only."

24 Q. The background of the label, are you able to make out an
25 insignia?

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1 A. It's the same horse head symbol.

2 Q. Next, can we go to the TB-7 folder. Could you read one of
3 these labels for the jury?

4 A. "TB-7, Acetylated Thymosin B4 and B10. Directions:
5 Reconstitute with 3 milliliters saline and administer either
6 IV, IM or SQ. Best results when used post event and five to
7 seven days prior to event."

8 Q. Special Agent Concannon, anywhere on this label do you see
9 the word "breezing"?

10 A. I do not.

11 Q. All right. Can we go to the NPX folder. Could you read
12 what it says on this label?

13 A. "NPX."

14 Q. On this label, do you see any ingredients?

15 A. I do not.

16 Q. Do you see any instructions for use?

17 A. I do not.

18 Q. Do you see any insignia?

19 A. I do not.

20 Q. All right. If we could go to Government Exhibit 9083, the
21 bin that has the label HP Bleeder. And while you're there, you
22 can probably grab one from Government Exhibit 9040, which is a
23 bin labeled HP Bleeder Plus.

24 (Continued on next page)

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1 BY MR. CHOW:

2 Q. From 9040, can you describe for the jury what we're looking
3 at here?

4 A. It's a vial with some type of liquid inside with a green
5 cap.

6 Q. And that's from the bin 9040 it which was labeled HP
7 Bleeder Plus.

8 And from 9083 can you describe what we're looking at
9 here.

10 A. It's a vial with some type of liquid in it with a green
11 cap.

12 Q. Finally can we bring one sample from 9052, which is a bin
13 that has the label EGH, and one exhibit from Government
14 Exhibit 9051. 9052 and 9051.

15 From 9051, Special Agent Concannon, can you describe
16 what we're looking at?

17 A. It's a vial with some type of liquid in it with a red cap
18 with an Equiscience label on the front with the horse head
19 symbol with EGH.

20 Q. Under that what does it say?

21 A. Equine growth hormone.

22 Q. And the white text underneath that?

23 A. 3 milligrams/millimeters DHEA.

24 Q. Under directions, can you read what that says?

25 A. Dose 4-500 kilogram horse 5 millimeters IM two times per

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1 week for eight weeks.

2 Q. And 9051, if we could read the text.

3 A. Federal law prohibits dispensing without a prescription.

4 Store at controlled room temperature 15 to 30 degrees Celsius

5 or 58 to 86 degrees Fahrenheit, protect from light,

6 intramuscular use only, 10 milliliters, multiple dose vial.

7 Q. And from 9052, a bin that had the label EGH?

8 A. It's a clear vial with liquid in it with a red cap.

9 MR. CHOW: Your Honor, that concludes the presentation
10 from the items seized from Equestology offices on October 28,
11 2019.

12 At this time, I will like to read a stipulation into
13 the record. This one is marked for identification as
14 Government Exhibit 9016.

15 THE COURT: All right. It will be received and you
16 may read from it.

17 (Government's Exhibit 9016 received in evidence)

18 MR. CHOW: The parties stipulate and agree to the
19 following facts: On or about October 28, 2019, Seth Fishman,
20 the defendant, was arrested and charged in connection with this
21 case and released on bail under the terms of Chapter 206 of
22 Title 18, United States Code.

23 While on bail, he was subjected to supervision. One
24 of the conditions of his bail was that he not violate federal,
25 state or local law while on bail. Seth Fishman has remained on

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1 bail at all relevant times since October 28, 2019, up to and
2 including January 28, 2022.

3 It is further stipulated and agreed by and between the
4 parties that this stipulation, which is Government
5 Exhibit 9016, may be received in evidence at trial the.

6 At this time the government offers Government
7 Exhibit 9016.

8 THE COURT: It is received in evidence, and this
9 stipulation is evidence in this case.

10 MR. CHOW: Ms. Jung, could we switch back to Trial
11 Director and bring up Government Exhibit 314K. And this
12 evidence that has been admitted subject to a prior stipulation
13 as well.

14 BY MR. CHOW:

15 Q. Reading from the bottom here, let's take the bottom email,
16 can you read who the bottom email was from, who it went to, and
17 when it was sent.

18 A. The email is from Lisa Ranger at equestology@gmail to Mary
19 Fox at mary.equestology@gmail as well as sethfishman@hotmail.
20 The subject is FYI. States: Hello, I am just down to five EPM
21 paste, need ASAP, please.

22 Q. Can you read the sent date for the email on the bottom.

23 A. It was sent Monday, January 20, 2020 at 4:06 p.m.

24 Q. And the middle email, can you read the date on which that
25 was sent?

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Concannon - Direct

1 A. On Monday, January 20, 2020 at 4:12 p.m.

2 Q. Who is the email from?

3 A. Seth Fishman, sethfishman@hotmail.com.

4 Q. What is the body of that email?

5 A. Will work O getting out this week if I can get API in next
6 few days.

7 Q. All right. Can we bring up Government Exhibit 314G.

8 All right. Special Agent Concannon, at the top of the
9 page do you see where it says "Equestology" and then "deposit
10 slip?"

11 A. I do.

12 Q. To the left can you read the date and the for?

13 A. The date is February 10, 2020, for November 1st, 2019 to
14 November 15, 2019.

15 THE COURT: Could we zoom in it on it? I can't see
16 it. I don't know if the jurors can.

17 Thank you.

18 MR. CHOW: All right. Ms. Jung, can we go to page 2,
19 please. And if you could blow up the total deposit amount.

20 Q. Can you read that total deposit amount?

21 A. 50,813.65.

22 Q. Could we bring up Government Exhibit 314F. Can we blow up
23 the top two lines, please.

24 To the left of where it says Equestology deposit slip,
25 can you read the date on and the for, please?

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Concannon - Direct

1 A. The date is February 10, 2020, for November 16, 2019 to
2 November 30, 2019.

3 MR. CHOW: Can we go to page 2, Ms. Jung, and blow up
4 total deposit amount.

5 Q. And what is the number that is appears there?

6 A. Total deposit amount 32,757.43.

7 MR. CHOW: Can we go to Government Exhibit 314E,
8 please. And again blowing up the top two lines.

9 Q. To the left of where it says Equestology deposit slip,
10 could you read the date and the for?

11 A. The date is February 10, 2020 for December 1st, 2019 to
12 December 15, 2019.

13 Q. Can we go to page 2. Blow up the total deposit amount.

14 Could you read that for the jury, please.

15 A. Total deposit amount 35,853.12.

16 Q. Can we bring up Government Exhibit 314D, and blow up the
17 top two rows.

18 To the left of where it says Equestology deposit slip,
19 could you read the date and the for.

20 A. The date is February 10, 2020 for December 16, 2019 to
21 December 31, 2019.

22 Q. Can we go to page 2, please, and blow up total deposit
23 amount.

24 Could you read that for the jury.

25 A. Total deposit amount 36,091.99.

M1STFIS5

Concannon - Direct

1 Q. Can we bring up Government Exhibit 314N like Nancy.

2 Starting from the bottom, do you see header
3 information for the email from -- the email on the bottom?

4 A. I do.

5 Q. Can you read just the header information?

6 A. From Mary Fox at mary.equestology@gmail sent on Friday,
7 December 6, 2019 at 12:57 p.m. to Seth Fishman at
8 sethfishman@hotmail, and the subject is: Lisa's needs.

9 Q. Could you read the body of the email?

10 A. Hello. Hello. So this is what I am in desperate need of,
11 Homeopathic Bleeder Plus, VO2 Max, Power Block, Omeprazole
12 liquid, BPR Blue, eventually potentially need but here is where
13 I can get them at the compound price, see if worth making a
14 batch or just get sourced through Boothwym or Rapid Equine,
15 Acetylcysteine, Rapid price \$16.88, Folex (ph) five times Rapid
16 price \$19.80, labels need to meet or exceed what is FDA
17 required before you send to me. Have a great day.

18 Q. All right. If we could blow up the response in the middle.

19 Could you read the header information for this email.

20 A. On December 6, 2019 at 2:00 p.m., Seth Fishman at
21 sethfishman@hotmail wrote: Tell Lisa I will negotiate a better
22 price with Jamie on a few items. Other items doing best to
23 work.

24 Q. And finally, can we blow up the top email.

25 And can you read the header information first.

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Concannon - Direct

1 A. From Mary Fox at mary.equestology@gmail, sent Friday,
2 December 6, 2019 at 2:03 p.m. Eastern Standard Time to Seth
3 Fishman at sethfishman@hotmail. Subject: This response to
4 Lisa's needs. Hello, I will let her know. Also, when you have
5 a list of FDA label requirements, let me know so we can get
6 ahead start redoing labels. Thank you, have a great day.

7 MR. CHOW: All right. If we could take that down.

8 Can we bring up Government Exhibit 314Q.

9 Q. All right. Can we start with the bottom email. I guess it
10 starts near the top of the page on February 10. Can you just
11 read the header information, please.

12 A. On February 10, 2020, at 12:02 p.m. Mary Fox at
13 mary.equestology@gmail wrote.

14 Q. Can you read the last line of the body, at the bottom of
15 this blow up.

16 A. EGH and VO2 Max being shipped out by end of week.

17 Q. If we could go back to the top email then.

18 And can you start by reading the header information
19 for this email.

20 A. From Seth Fishman at sethfishman@hotmail, sent Monday,
21 February 10, 2020, 12:41 p.m. Eastern Standard Time to Mary Fox
22 at mary.equestology@gmail subject is in response to update.
23 How many VO2 Max and EGL? Also he needs to make 600 PSDS.
24 They should be able to do all three projects this week. PSDS
25 should be done before EGH.

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Concannon - Direct

1 MR. CHOW: All right. We can take that down.

2 Q. Special Agent Concannon, during your time at the FBI, have
3 you participated in searches of physical locations?

4 A. Yes.

5 Q. Approximately how many times?

6 A. Approximately three.

7 Q. Directing your attention to December 3rd, 2021, did you
8 participate in a search of a location on that date?

9 A. I did.

10 Q. What location did you search?

11 A. I searched the Equestology office at 3500 Northwest Boca
12 Raton Boulevard, Boca Raton, Florida.

13 Q. What kind of location was it?

14 A. It was an office as well as a storage or warehouse.

15 Q. When you arrived at the property, who was present?

16 A. When we arrived at the property we did not think anyone was
17 present.

18 Q. Did you later learn that someone was present?

19 A. Yes. Approximately five minutes after arriving we called
20 Mary Fox, one of the employees who was inside, and she opened
21 the door for us.

22 Q. Did she give you consent to enter the property and conduct
23 a search?

24 A. She did.

25 Q. Approximately what time of day was this?

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Concannon - Direct

1 A. Approximately 10:30 in the morning.

2 Q. How many other agents conducted the search with you?

3 A. It was myself and two other agents.

4 Q. How did you conduct the search?

5 A. We conducted the search by first entering the office area
6 and taking entry photos, and then we continued to move
7 throughout the office taking additional photos of the office
8 space, the storage area in the office space, and then we moved
9 into the space out back, which is a garage that was turned into
10 a warehouse, taking photos of the entire office.

11 Q. Okay. Just so we can have a better sense of what the place
12 looked like, can you describe the layout of the location as you
13 were walking into the door?

14 A. Yes. So when you walk in, Mary Fox's desk is right there,
15 and then along the right side of the wall is like a kitchen
16 counter with kitchen cabinets and a sink, and if you go past
17 that there's a bathroom, and to your right is a door that moves
18 into the garage or warehouse area.

19 Q. Did you seize anything that day?

20 A. We did not.

21 Q. After taking the various photographs that you just
22 mentioned, what did you do?

23 A. When we took the various photographs, we were leaving, and
24 Mary Fox offered if she could write the time that we departed
25 as well as everything was in good order on the consent to

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Concannon - Direct

1 search form.

2 Q. Approximately how long were you at the location?

3 A. About one hour.

4 Q. Special Agent Concannon, in front of you on the dais there
5 should be a binder with government exhibits that have been
6 marked for identification as Exhibit 3900 through 3911.

7 MR. CHOW: And your Honor, I have given a courtesy
8 copy to defense counsel already.

9 THE COURT: All right. Thank you.

10 BY MR. CHOW:

11 Q. Special Agent Concannon, can you flip through all of those?

12 A. Okay.

13 Q. Do you recognize those photos?

14 A. I do.

15 Q. What are they?

16 A. They're photos from the day of the search.

17 Q. Do those photos fairly and accurately depict the premises
18 and the items as you observed them the morning of December 28,
19 2021?

20 A. They do.

21 MR. CHOW: The government moves Exhibits 3900 through
22 3911 into evidence.

23 MR. SERCARZ: No objection.

24 THE COURT: They are received.

25 (Government's Exhibits 3900 through 3911 received in

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Concannon - Direct

1 evidence)

2 MR. CHOW: May they be published to the jury?

3 THE COURT: Yes.

4 MR. CHOW: Ms. Jung, let's start with 3905.

5 Q. Special Agent Concannon, what is this?

6 A. This is a document that was laid out on the counter prior
7 to our arrival by Mary Fox.

8 Q. Can you read what it says in underline in bold at the top.

9 A. Omeprazole.

10 Q. Can you read the -- just start reading down, I guess.

11 A. Makes five 500 milliliters bottles with size 28 insert and
12 white cap. 50 milliliters, apple flavor, half a teaspoon
13 propylparaben, one kilogram or one container of omeprazole
14 powder, 1,750 milliliters propylene glycol, 16 ounces baking
15 soda.

16 Measure all ingredients into mixing bowl. Start mixer
17 on first speed to begin, then increase to third speed and mix
18 until smooth. Stop mixer and scrape sides to incorporate all
19 ingredients. Mix again for about four minutes. Pour into
20 500-millimeter glass beaker and fill plastic bottles. Put
21 stopper insert into bottle, follow with white cap and label.

22 MR. CHOW: Ms. Jung, could we bring up Government
23 Exhibit 3900.

24 Q. Special Agent Concannon, what are we looking at here?

25 A. These are syringes that I'm holding the day of the search

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Concannon - Direct

1 that we found.

2 Q. What does the label on the bag say?

3 A. Send with omeprazole.

4 MR. CHOW: If we could take down the blow up.

5 Q. In the background of the bag, what are we looking at?

6 A. It's shelving that had additional syringes as well as other
7 products on the shelves.

8 Q. Can we bring up 3907, please.

9 Special Agent Concannon, what are we looking at here?

10 A. This is shelving that was in the office space on the right
11 side across from Mary Fox's desk with disposable syringes,
12 needles and other accessories.

13 Q. Can we bring up Government Exhibit 3904.

14 What are we looking at here?

15 A. This is shelving that was out back in the garage area with
16 different types of caps that were all in packaging.

17 Q. And can you describe for the jury what color caps we appear
18 to be looking at here.

19 A. There are silver caps, maroon caps, blue caps, another
20 color blue cap, a striped blue and silver cap, red and silver
21 striped caps, as well as black and silver striped caps.

22 Q. Could we bring up Government Exhibit 3902.

23 What is this?

24 A. This is another document that was laid out in the office
25 space across from Mary Fox's desk prior to our approval.

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Concannon - Direct

1 Q. Could you read this one for the jury?

2 A. EPM Paste, makes 50 60 CC syringes, 750 grams Toltrazuril,
3 175 grams Diclazuril, 400 milliliters propylene glycol, 1,700
4 milliliters glycerin.

5 Measure all ingredients into mixing bowl. Start mixer
6 on first speed to begin then increase to fourth speed and mix
7 until smooth. Stop mixer and scrape sides to incorporate all
8 ingredients. Mix again for about four minutes. Fill 60 CC
9 syringes. Put stopper in syringe using a piece of fishing wire
10 across opening to get rid of air bubbles. Clean syringe with
11 Q-tips and paper towels as necessary.

12 MR. CHOW: Can we bring up Government Exhibit 3901.
13 And actually can we also throw on the screen 3908 and 3906.

14 Q. Starting from the left-hand side, can you tell us what
15 we're looking at here?

16 A. These were labels found out back that I'm holding in the
17 storage area.

18 Q. Going to the top right, what are with he looking at there?

19 A. These are also labels that were found out back in the
20 storage area.

21 Q. And going to the bottom right, what are we looking at here?

22 A. This is another ingredient list piece of paper that Mary
23 Fox had laid out for us prior to our arrival.

24 Q. Next can we take a look at Government Exhibit 3903.

25 And before we get to the item that has been pulled

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Concannon - Direct

1 out, what are we looking at here, what area of the premises?

2 A. So this is the storage area out back. You can see that
3 there's metal shelving. This metal shelving expanded the whole
4 length of the storage area on both sides approximately four or
5 five storage levels high filled with different products or
6 packaging.

7 Q. And there appears to be one that is pulled out here. Can
8 you read for us or identify any portions for us that are
9 legible.

10 A. It's the horse head symbol with the words Equi-Tech and VO2
11 Max underneath.

12 Q. Can we go to Government Exhibit 3909.

13 Can you describe what we're looking at here?

14 A. This is the same shelving out back in the storage area with
15 the product boxing EGH with the horse head symbol SP Brands.

16 Q. Can we bring up 3911, please.

17 Can you describe for us where this picture was taken?

18 A. This picture is from the storage area out back on
19 additional shelving.

20 Q. And what does it say on the label outside the bin that's
21 depicted here?

22 A. HP Bleeder, homeopathic bleeder. Directions: Administer
23 5 CCs IV or IM. I am having trouble making out the rest of
24 that line.

25 Q. That's fine. On the left-hand side are you able to make

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Concannon - Direct

1 out anything?

2 A. The letters SPC.

3 Q. And Government Exhibit 3910, please.

4 What are we looking at here?

5 A. This is product that was on that shelving that we pulled
6 out to take a photo of.

7 Q. Are you able to read anything off of the label of this
8 vial?

9 A. So the vial says Bleeder, homeopathic bleeder. And I can
10 make out the IM 6 to 8 hours before exercise and then the line
11 below it with: No known testable ingredients.

12 Q. If we could take that down.

13 So those were all pictures taken on December 3rd,
14 2021, is that right?

15 A. That is correct.

16 Q. So that's less than three months ago?

17 A. That's correct.

18 MR. CHOW: Your Honor, at this point I would like to
19 ask the jurors to open their transcript binders to tab 912B
20 like boy.

21 And on the screen, Ms. Jung, could we bring up 912B
22 and 912BT.

23 For the record, this is a recording, the date is
24 November 18, 2018, and the participants are Seth Fishman and
25 Bambang.

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Concannon - Direct

1 THE COURT: All right, Mr. Chow.

2 MR. CHOW: Go ahead, Ms. Jung.

3 (Audio recording played)

4 MR. CHOW: Your Honor, at this time could I maybe
5 reoffer a couple of exhibits. I believe earlier when we had
6 offered them into the record we had mispronounced the exhibit
7 number, so I just want to make clear that we have admitted all
8 the exhibits that we intended.

9 THE COURT: If some exhibits came in that you didn't
10 intend because you mispronounced the number, you need to let me
11 know that.

12 MR. CHOW: I don't think that is what happened. I
13 think what happened here is we said -- when we entered the
14 transcript numbers 101A-T through 199T, we should have
15 specified that it's 199B-T.

16 (Government's Exhibits 101A-T through 199B-T received
17 in evidence)

18 THE COURT: And those are the transcripts in the
19 binders?

20 MR. CHOW: Correct.

21 THE COURT: Okay.

22 MR. CHOW: Then we entered 1102, we meant to say
23 11002, an extra zero in there.

24 THE COURT: 11002. No objection?

25 MR. SERCARZ: No objection.

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1 THE COURT: 11002 is admitted.

2 (Government's Exhibit 11002 received in evidence)

3 MR. CHOW: And we offered 9300, we meant to say 9003.

4 There is no 9300 exhibit.

5 THE COURT: There is no 9300?

6 MR. CHOW: Let me double-check.

7 THE COURT: Or 9300 is not in evidence.

8 MR. CHOW: We meant to say 9003 for the stipulation
9 yesterday when we were offering the stipulation. Reading the
10 transcript overnight, it appears we may have said 9300 instead
11 of 9003.

12 THE COURT: 9003 is the stip?

13 MR. CHOW: Is the stipulation, yes.

14 THE COURT: So one of the stipulations we talked about
15 yesterday is not 9300 it's 9003.

16 (Government's Exhibit 9003 received in evidence)

17 MR. CHOW: Thank you, your Honor.

18 Ms. Jung, can we bring up 119D, like David, and if the
19 ladies and gentlemen of the jury could flip to 119DT in their
20 binders.

21 For the record, this is a call February 26 between
22 Seth Fishman and Lisa Giannelli.

23 Looks like we're all set.

24 (Audio recording played)

25 MR. CHOW: No further questions, your Honor.

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1 THE COURT: All right. Thank you.

2 Cross?

3 MR. SERCARZ: I have no questions for this witness.

4 THE COURT: All right. Sir, you are excused then with
5 the thanks of the Court. Thank you very much.

6 THE WITNESS: Thank you, your Honor.

7 THE COURT: Mr. Chow?

8 MR. CHOW: At this time the government rests its case.

9 THE COURT: All right. Ladies and gentlemen of the
10 jury, I think we're going to take our morning break now and
11 we'll see you back here in about 10 or 15 minutes.

12 Please leave your notes here. Please do not discuss
13 the case until it's turned over to you to deliberate. Thank
14 you.

15 (Jury not present)

16 THE COURT: Mr. Sercarz?

17 MR. SERCARZ: Your Honor, when the jury returns, it's
18 my intention to rest.

19 THE COURT: Are there any motions at this time?

20 MR. FERNICH: Just for the record, a pro forma motion
21 to dismiss both counts of the indictment on the ground that the
22 government has failed to prove the elements of the offense
23 beyond a reasonable doubt. We don't need any argument on that.

24 The only thing of substance that I have that is not
25 for the record, could the government just marshal the venue

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1 evidence for Count One as opposed to Count Two? I didn't catch
2 it.

3 THE COURT: Hold on about that. Is there anything
4 more you want to say with respect -- I assume you mean a motion
5 under Rule 29.

6 MR. FERNICH: Yes. If I didn't say it, that's what I
7 mean.

8 THE COURT: Does the government wish to be heard?
9 It's not necessary.

10 MS. MORTAZAVI: No, your Honor. There was a specific
11 request for our venue proof on Count One.

12 THE COURT: Sorry, is that in connection with your
13 motion?

14 MR. FERNICH: Yeah.

15 THE COURT: Sorry.

16 MR. FERNICH: That's the only specific.

17 THE COURT: Go ahead.

18 MS. MORTAZAVI: Certainly. Your Honor, we stipulated
19 into the record the GPS coordinates for certain calls that took
20 place. They were calls where Seth Fishman was located in
21 Manhattan. And those calls had to do with him fulfilling an
22 order for bleeder pills that was requested by Jorge Navarro in
23 advance of the race, and I think that satisfies the venue
24 requirement.

25 MR. FERNICH: Understood. It certainly suffices to go

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1 to the jury. Thank you, your Honor.

2 THE COURT: All right. As Mr. Fernich has just
3 conceded, at least with respect to the venue point, there is
4 sufficient evidence to go to the jury with respect to Count
5 One.

6 In any event, the motion under Rule 29 is denied. As
7 you know, I have to draw every reasonable inference in favor of
8 the government, view all the evidence in the light most
9 favorable to the government, crediting any inference that can
10 be drawn in its favor, and deferring to the jury's assessment
11 on credibility and weight of the evidence. There is certainly
12 sufficient evidence that has been introduced for this case to
13 go to the jury on both counts.

14 Anything further from the defendants?

15 MR. FERNICH: Not at this time, your Honor.

16 THE COURT: And Mr. Sercarz, you said it's your intent
17 to rest?

18 MR. SERCARZ: Yes, your Honor.

19 THE COURT: Let me just again confirm with
20 Dr. Fishman.

21 You understand, Dr. Fishman, that you have the right
22 to testify, but you, by no means, are obligated to testify.
23 You understand that, correct?

24 THE DEFENDANT: Yes, I do, your Honor.

25 THE COURT: And you understand that ultimately, while

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1 your lawyers may give you advice, it is your decision whether
2 to take the stand or not, correct?

3 THE DEFENDANT: That is correct, your Honor.

4 THE COURT: And it is your decision not to testify,
5 correct?

6 THE DEFENDANT: That is correct, your Honor.

7 THE COURT: All right. Thank you.

8 All right. Then we'll stand in recess until around
9 11:15 or so. Thank you.

10 (Recess taken)

11 THE COURT: All right. Be seated everyone, the jurors
12 are on their way up.

13 (Jury present)

14 THE COURT: All right. Mr. Sercarz?

15 MR. SERCARZ: The defense rests, your Honor.

16 THE COURT: All right. Ladies and gentlemen, that
17 means we have come to the conclusion of the evidence or the
18 presentation of evidence in this case. So what we're going to
19 do then is I need to talk with the lawyers about some legal
20 issues, but we are going to release you for the rest of the day
21 then. I told you I thought we were ahead of schedule and I
22 would try to get you out of here with the weather, so I'm going
23 to excuse you for the rest of the day and I hope everyone has a
24 nice weekend.

25 I will ask you to please be back Monday morning at

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1 10:00 a.m., and at that time you will hear the closing
2 arguments from each side. Then I will instruct you on the law
3 and you will retire and begin deliberating and deciding this
4 case.

5 So I hope everyone has a nice weekend. I just remind
6 you again, please do not discuss this case with anyone,
7 including your family and friends. Don't read about the case,
8 please don't do any independent research, and I hope everyone
9 has a nice weekend.

10 You can take your notebooks with you and leave them in
11 the jury room because that will get locked up. The binders you
12 can leave on your chairs.

13 Thank you everyone.

14 (Jury not present)

15 THE COURT: All right. So let's just talk logistics.
16 Obviously, I will meet with the lawyers and we'll do a charging
17 conference. Do people need time to consider and talk about the
18 newly proposed charges from the defendant or are you ready to
19 proceed? What's everybody's pleasure?

20 MS. MORTAZAVI: Your Honor, we would like a little bit
21 of additional time to review the proposal from this morning.

22 THE COURT: All right. Is there anything else that we
23 should talk about?

24 MR. ADAMS: Your Honor, we will also submit in writing
25 a proposal for the 3147 charge enhancement. It is missing from

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1 the RTCs. It's included in the government verdict form, but
2 we'll submit proposed language shortly.

3 MS. MORTAZAVI: And sorry to be tag teaming this, but
4 we also understand that defense counsels' request is that the
5 verdict sheet be changed to include the lesser included count,
6 and so we would like to discuss with defense counsel what that
7 proposal would look like and see if we can come to an
8 agreement, and otherwise we will bring it to the Court's
9 attention.

10 THE COURT: Obviously if you come to some agreement on
11 that, that means you come to some agreement on the charge
12 request, too, correct?

13 MS. MORTAZAVI: Correct.

14 THE COURT: Let me ask you this -- I don't really want
15 to do this in open court.

16 MR. FERNICH: You don't want to do it piecemeal.

17 THE COURT: No, I don't want to do it in open court,
18 so maybe we can talk briefly in the robing room, on the record
19 but in the robing room. Then I will give you all a break so
20 you can talk to each other and let me know how long you need
21 and we'll resume to do the rest of the charging conference
22 then.

23 MS. MORTAZAVI: Thank you, your Honor.

24 (In jury room, counsel for the parties, judge and law
25 clerk present)

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1 THE COURT: So the main thing I wanted to talk to you
2 all about, but I didn't want to do this in open court, is
3 Ms. Mortazavi, you said that you're going to talk with
4 Mr. Fernich and Mr. Sercarz about the verdict form. The
5 amendment to the verdict form would be if we are going to
6 charge with respect to the lesser included offense. So do I
7 take it from your comments that the government is not opposing
8 charging the lesser included offense?

9 MS. MORTAZAVI: Well, that's what we wanted to
10 discuss, first to see what language they would propose in the
11 verdict form, and if they have a separate request to charge we
12 want to see that.

13 THE COURT: That was in the stuff you got this
14 morning, right?

15 MR. FERNICH: I'm sure she hasn't --

16 THE COURT: You haven't had a chance to look. Fair
17 enough. You caught me a little off guard because I took from
18 that you were okay with the lesser included offense, but you
19 haven't decided yet.

20 MS. MORTAZAVI: Correct. I wanted to signal if the
21 parties can reach an agreement, we would try before the
22 charging conference.

23 THE COURT: Fair enough. How long do you all think
24 you need?

25 MR. SERCARZ: Your Honor, while we're in here, may I

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1 ask what your intention is with regard to Mr. Fishman? Should
2 he be released? Do you want him to stick around?

3 THE COURT: He's free to leave. That's your call. As
4 you know, I'm not sure that he has a right to be at a charging
5 conference.

6 MR. FERNICH: We will waive any right.

7 THE COURT: Are you waiving his right, for the record?

8 MR. FERNICH: Yes, we waive his right to be present
9 for the legal proceedings to take place during the rest of the
10 day.

11 THE COURT: Then he's free to leave.

12 MR. SERCARZ: I will let him know when we break.

13 THE COURT: All right. So it's 11:30.

14 MS. MORTAZAVI: Your Honor, if we could reconvene at
15 2:00 p.m.

16 THE COURT: I would give you an hour to talk, but then
17 we're running into the lunch hour.

18 Does that work for you?

19 MR. FERNICH: Yes, I want to get the test.

20 THE COURT: I don't know what you're going to do
21 because you're not going to be unmasking.

22 MR. FERNICH: Let me see if they'll give it.

23 THE COURT: You're welcome to try, but I think that's
24 the point of it, so you can unmask.

25 So 2 o'clock. I will see everybody back here at

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1 2 o'clock. Thank you.

2 (Recess taken)

3 (Continued on next page)

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Charge Conference

A F T E R N O O N S E S S I O N

2:11 P.M.

(In open court; jury not present)

THE COURT: Good afternoon. Originally, I thought we were going to do it inside, and since you're all settled, we may as well just do it in here.

All right. So we're assembled for the charging conference in this case. The folks in the back are all part of your team?

MR. ADAMS: They are, your Honor.

THE COURT: Okay. We have no one with us except for the trial teams for the defendant and for the government.

I have the proposed request to charge that was submitted to me at the outset of the case, which I had understood to be on consent with the exception of a few objections that were noted.

I've now received this morning supplemental defense requests to charge, and right over the lunch break we received from Mr. Adams a request 15 relating to the allegation that the defendant continued to commit the offense charged in Count Two after he was released on bail, and a request 16 on the lesser-included offense.

So let me first just ask the government, you do consent to a charge on the lesser-included offense?

MS. MORTAZAVI: We do, your Honor, and we have a

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1 proposed verdict form, but I understand defense counsel does
2 not object to, and we provided to the Court consistent with the
3 charge.

4 THE COURT: All right. Look, it may be simplest if we
5 talk about the verdict form first.

6 MS. MORTAZAVI: Sure.

7 THE COURT: My -- I'll be candid, my initial reaction
8 when I got the proposed verdict form at the very beginning was,
9 shouldn't it read, when we had two defendants: With respect to
10 this count, how do you find; guilty or not guilty? And then a
11 follow-up question: If guilty, do you find that the defendant
12 acted with an intent to defraud or mislead? Yes or no.

13 That just seems so much simpler to me, and at that
14 point, I guess I was assuming that you might have a
15 lesser-included offense charge. Turned out in the beginning
16 you didn't agree on that, but now you do. This that you've
17 given me just seems so confusing.

18 MS. MORTAZAVI: I understand, your Honor, and where we
19 started was looking at the Sand instructions on
20 lesser-included, and then attempting to pull other verdict
21 forms that we were able to collect in the time we had this
22 afternoon. And it appears, based on the Sand instructions, the
23 notion was that the jury should first be presented with the
24 charge in the indictment to consider and then proceed, if they
25 cannot reach an agreement on that charge, to a lesser-included

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1 consideration. But we do acknowledge, your Honor, there is
2 another way of doing things, and it is the way that the Court
3 has proposed.

4 THE COURT: I mean, look, I'm going to be very candid
5 with you all. It's no secret that I'm not an experienced
6 criminal law practitioner, and so I honestly did not know if
7 there's some legal reason why it has to be framed the way
8 you're framing it.

9 MS. MORTAZAVI: There's no legal or constitutional
10 requirement to the framing. I think it could be posed in the
11 way that the Court just described.

12 THE COURT: So let me hand to you -- I mean, we've
13 done a lot of work trying to find other drug adulteration and
14 misbranding cases in this district. For what it's worth, I had
15 a lot of reactions about, are you kidding, a lesser-included
16 offense? But that's neither here nor there.

17 This is another drug adulteration and misbranding
18 case, where I have looked at the instructions. This is a case
19 that Judge Buchwald had that went to the jury, I think, in
20 2015; so it's some time ago. Some of you may know this case,
21 and by coincidence, I mean, I had the independent thought
22 reading your initial verdict form that, why wouldn't you just
23 say: If guilty, did he have the intent to defraud or mislead?
24 Yes or no?

25 And then we came across just now, I asked Ms. Popper

1 to pull the verdict form that Judge Buchwald used because I had
2 been looking at her jury charges, and lo and behold, she did it
3 exactly the way I thought seemed the simplest way to do it.
4 The second page you can ignore because that's about additional
5 charges for wire and mail fraud.

6 MS. MORTAZAVI: Your Honor, we had also come across
7 that verdict form and did have discussions about the best way
8 to format it. Again, where we landed was using the Sand
9 instructions in this flashpoint, but I do agree there is
10 another way of doing things, but we would need to revise the
11 standard instructions to reflect the verdict form.

12 THE COURT: I know. That's why I wanted to start with
13 the verdict form and work backwards because if everyone agrees
14 on a simpler verdict form -- I think a general observation
15 about the charges you gave me, they're largely consensual, and
16 so I'm not going to spend a lot of time tinkering with them.
17 But I do find they're denser and more confusing than they need
18 to be in places.

19 So, you know, that's just an observation for you all.
20 As I say, I'm not going to tinker with them unless an objection
21 has been raised, but for example, it seems to me Count One and
22 Count Two both charge conspiracies to adulterate or misbrand
23 drugs. They have different time frames, and they have
24 different alleged overt acts. And as I'm recalling, I think
25 they have three objects in common, and one of them has a fourth

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1 object, but you say it in a very repetitive way. But it is
2 what it is.

3 I'm not going to ask, unless you all want to go back
4 and streamline. But with respect to this, and with respect to
5 your proposed charge on the lesser-included offense, I find it
6 very confusing.

7 So do you want to talk to each other and see if -- I
8 mean, look, if you're hell bent and you're in agreement on this
9 form, we'll use it, but I prefer to have things understandable
10 so we don't invite error or confusion.

11 MR. FERNICH: Judge, let me see if I can help with the
12 verdict form, and I mean that. I am familiar with this case
13 because she came to see me a few times. What I think the
14 problem is -- first of all, conceptually, I agree with the
15 Court, that this is a simpler way to do it.

16 What I think the problem is, when you ask in question
17 one or when the form asks in question one: "With respect to
18 Count One, how do you find the defendant, guilty or not
19 guilty?" I think -- and Mr. Adams had alluded to this with me
20 back in the robing room on a different subject -- you know,
21 guilty under the Apprendi line of cases is sort of problematic
22 because, you know, any necessary offense element creates a
23 separate crime even if it's just a penalty enhancer.

24 So conceptually, I like this. What I would suggest is
25 the following: With respect to Count One, did you find that

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1 Dr. Fishman participated in a conspiracy to adulterate or
2 misbrand; yes, no? If yes, do you find that he had intent to
3 defraud or mislead; yes, no?

4 That would take out the guilty --

5 THE COURT: I don't like taking the "guilty" out all
6 together. And to be honest, that was my hesitation, and that's
7 why I asked Ms. Popper to pull the Lasher form because in a
8 criminal case it just seems to me somewhere the jury ought to
9 be asked to say "guilty" or "not guilty."

10 And I wondered if I was wrong even to say, on the
11 intent, that they could say "yes" or "no," when I was trying to
12 think of a way to frame that in terms of guilty or not guilty
13 when I saw this.

14 MR. FERNICH: Well, perhaps, perhaps we could work in
15 the guilty or not guilty under the intent to defraud. So --

16 MR. ADAMS: No. I'm sorry, your Honor. If I could --
17 the Lasher form that you have is correct, and it's clearer. If
18 we could have two minutes to talk about what's in the Sand
19 instruction, I think we can resolve this.

20 THE COURT: I think that's what you should do. I
21 really do. And let me tell you my one particular thing, before
22 I let you talk, on Sand that I find. I take it this might go
23 to the point Mr. Fernich was addressing, but on the second
24 page, "If you find that the government has not satisfied its
25 burden of proof on any of those elements" -- I'm going to skip

1 the parenthetical -- "then before you render a verdict of
2 guilty, not guilty, proceed to whether the government has
3 proven that they committed without the intent." That, to me,
4 is not right.

5 I don't know if you took this right out of Sand, but
6 that seems wrong to me because suppose, in this first part, the
7 elements that the jury finds missing has nothing to do with
8 intent. It has to do with one of the substance developments,
9 I'm going to call it, as opposed to the intent elements.
10 You're directing them to go ahead and consider the
11 lesser-included offense, but you don't get to the
12 lesser-included offense unless you first find that there was
13 adulteration and misbranding. And then the question is, was
14 there intent or not? Do you follow what I'm saying?

15 MR. ADAMS: I do.

16 THE COURT: You look puzzled, Ms. Mortazavi.

17 MS. MORTAZAVI: No. No, your Honor.

18 THE COURT: I don't think it's if you haven't
19 satisfied your burden of proof on any of those elements. I
20 think it's you find that they haven't satisfied their burden of
21 proof on intent, then you go to the lesser-included charge.

22 MS. MORTAZAVI: Well, your Honor, it may be moot
23 because I think we can use this --

24 THE COURT: Why don't I let you try to work on that.
25 All right? And then just let us know when you're ready.

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1 MR. FERNICH: Your Honor, it wouldn't be the first,
2 you know, Rosamondo. It wouldn't be the first time that the
3 Sand charge is wrong --

4 THE COURT: Okay. That doesn't help me so much.

5 MR. FERNICH: No, but I --

6 THE COURT: Honestly, I didn't go back and look at
7 Sand. I told you I'm not an expert in this, but this just
8 doesn't even make sense to me. So if it doesn't make sense to
9 me, I'm loathed to use it with the jury.

10 MR. FERNICH: You're talking about the one that we
11 just submitted?

12 THE COURT: Yes. Okay. So why don't I let you talk
13 about it. I'll be back in a minute.

14 MS. MORTAZAVI: Thank you, your Honor.

15 MR. ADAMS: Thank you.

16 THE COURT: All right. We'll be back momentarily.
17 Thank you.

18 (Recess)

19 THE COURT: So can I just make a suggestion, please?
20 Why don't we talk about the other disputed issues, and then I
21 can leave you to talk about this, and you can just send me
22 whatever you agree on. Does that work?

23 MR. SERCARZ: Yes.

24 MS. MORTAZAVI: Fine for the government.

25 THE COURT: All right. And I heard a "yes" from the

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1 back too.

2 MS. MORTAZAVI: And on that, your Honor, we have
3 proposed language. I think we'll be close.

4 THE COURT: Okay. Good. All right. So let me just
5 ask the other charge that was handed up to me by Mr. Adams, the
6 offense committed while released on bail, is that on consent?

7 MR. FERNICH: No objection to that.

8 THE COURT: I'm sorry, I heard Mr. Fernich, no
9 objection. Ms. Mortazavi, were you saying something?

10 MS. MORTAZAVI: Oh, I was going to repeat the same
11 thing, I believe it's on consent.

12 THE COURT: Okay. Thank you. All right.

13 So in the first batch of instructions that were
14 submitted, you know, before the start of the trial, after I
15 issued an order and then counsel for both sides conferred, it's
16 my understanding that but for what was included in red or blue,
17 all of the charges are agreed, correct?

18 MR. FERNICH: Yes.

19 MS. MORTAZAVI: The blue and red text are the disputed
20 portions, yes.

21 THE COURT: Yes, that's what I'm saying, everything
22 else is on consent, right?

23 MS. MORTAZAVI: Correct.

24 THE COURT: Okay. And then I have the supplemental
25 requests that I received from Mr. Fernich and Mr. Sercarz this

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1 morning. I assume those are not on consent?

2 MS. MORTAZAVI: They are not on consent.

3 THE COURT: Okay. So let's look at the disputed
4 areas, and then I'm going to just quickly run through. There
5 are a few other things about this consensual set that I want to
6 tell you. Obviously, we're going to -- well, I'll tell you now
7 we're going to revise the consensual set, obviously, to delete
8 the reference to Ms. Giannelli being a defendant.

9 The "defendants" all have to be made singular. The
10 places where it says "they conspired together and/or with
11 others," should now be "they conspired with others." So those
12 are kind of global.

13 I do have some edits throughout that maybe we should
14 just walk through, and then I'll pause when I get to -- it's
15 pages 20, 21 -- well, requests 10 and 11 where there were
16 disagreements. So why don't we just walk through them.

17 All right. I'll go quickly to tell you what I'm
18 proposing. And my suggestion is, since you need to pull in
19 these two new charges and anything we add at the request of the
20 defendant, you need to make these edits about singular, plural
21 and all, are you all going to generate a new draft?

22 MS. MORTAZAVI: Yes, your Honor.

23 THE COURT: Okay. I like the table of consents. I
24 appreciate that, and I think the jurors will too. I have seen
25 others that don't have that.

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1 Could you please make it larger font?

2 MS. MORTAZAVI: Yes, do you have a font or should we
3 use our judgment?

4 THE COURT: What is it?

5 MS. MORTAZAVI: These are size 12.

6 THE COURT: Maybe mine is smaller because I did it
7 with the track changes showing; so that might be part of the
8 problem. But I don't know, I wouldn't mind 14, I guess.

9 MS. MORTAZAVI: All right, your Honor. Your Honor, we
10 plan to submit a Word version as well.

11 THE COURT: That would be great. Then we can change
12 it. I'm going to add a little bit of an introduction that just
13 says something like, you know, "The evidence is closed, and now
14 it's time for you to do your job" kind of thing. All right?

15 Page 2 of charge No. 1, there's a paragraph in the
16 middle that says "the evidence before you consists of." Is
17 everyone with me?

18 MR. SERCARZ: Yes.

19 MS. MORTAZAVI: Yes, your Honor.

20 MR. ADAMS: Yes.

21 THE COURT: I would like the paragraph that says "You
22 may also consider stipulations" to be part of that same
23 paragraph about what the evidence is, and I want it to read as
24 follows: "You may also consider the stipulations of the
25 parties as evidence and the exhibits received pursuant to

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1 certain of those stipulations, including the audio recordings
2 and physical evidence that were admitted." Well, you don't
3 need "that were admitted," that's redundant. Sorry?

4 MR. FERNICH: I'm talking to my colleague.

5 THE COURT: I didn't know if we had an objection.

6 All right. I don't recall that I asked any questions;
7 so you say in the next paragraph "I also ask you to draw no
8 inference from the fact that on occasion I asked questions." I
9 may have asked a couple of clarification points to the lawyers;
10 so please just change it to say that I "interacted with the
11 witness." Okay?

12 And then anything I said "was intended only for
13 clarification."

14 I'm not going to pause on all of the plurals and
15 singulars and Giannelli issues. Okay?

16 MS. MORTAZAVI: Yes, your Honor.

17 THE COURT: Coming over to request No. 5, at the end
18 of the first paragraph, I would like to insert the following,
19 which is from Sand.

20 MS. MORTAZAVI: I'm sorry, where did you plan to
21 insert it?

22 THE COURT: Right after where you say "The indictment
23 is a charge or accusation, it is not evidence," right there. I
24 want to make the following insert, it's from Sand 3-3: "The
25 defendant is not charged with committing any crime other than

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1 the offenses contained in the indictment."

2 And as I'm going through this, if there are
3 objections, you should let me know.

4 MS. MORTAZAVI: Yes, your Honor.

5 THE COURT: Because I'm going to, at the end, assume
6 this is all on consent.

7 All right. The next page, "In a moment I will begin
8 to read instructions," if you would please change that to "I
9 will instruct you on the law."

10 At the end of that paragraph, I mean, this is relating
11 to Giannelli, "or the law as it applies to one but not both of
12 the defendants," comes out. And then take out the word
13 "below." "I will note for you." Okay?

14 MR. FERNICH: This is the last paragraph, yes?

15 THE COURT: Sorry?

16 MR. FERNICH: I'm sorry, we were talking about the
17 last paragraph?

18 THE COURT: Yes.

19 MR. FERNICH: In request No. 5?

20 THE COURT: Yes. In other words, this reads as
21 though -- I'm going to be speaking it.

22 Although, just so there's no confusion, I do intend to
23 give a hard copy to the jurors only because I do think it's
24 dense in places, and it will be easier for them to follow
25 along. I assume no objection to that?

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1 MS. MORTAZAVI: No.

2 THE COURT: Defense?

3 MR. FERNICH: No, no objection.

4 THE COURT: All right. Thank you.

5 Request No. 7, you have bracketed requests that I read
6 the statutory allegations of Count One. Can you please include
7 them in this? And I assume you mean, with respect to Count
8 One, paragraphs 24 through 28 of the indictment, and with
9 respect to Count Two, I'm understanding that to mean paragraphs
10 34 through 37 of the indictment.

11 The specific question that I'm asking is, I assume you
12 are not asking me to read the paragraph that continues with the
13 alleged overt acts?

14 MS. MORTAZAVI: That's correct, your Honor.

15 THE COURT: Okay. Defendants, you're onboard?

16 MR. FERNICH: Onboard.

17 THE COURT: Okay. Thank you.

18 All right. The next several pages are the ones where
19 I'd ask you to go back and look. It's request 9, and
20 particularly the discussion about the objects of the
21 conspiracy. If you could just see if there's any way to
22 streamline this, and maybe there isn't, but if you just would
23 take a look at that, I'd appreciate it. Okay?

24 MR. ADAMS: Sure.

25 THE COURT: All right. Request 10, this is just

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1 stylistic, but I want it to begin "As I mentioned" take out
2 "above that."

3 Okay. Then we come to page 20, which is the first
4 place where I believe there's a substantive disagreement
5 between the parties.

6 Oh, I'm sorry, before we get to the competing blue and
7 red paragraphs, at the very top, it begins at the end of the
8 first line, there's something that is not a sentence: "If
9 other evidence establishes this intended use, such as the
10 marketing, promotion or previous labeling of the product by the
11 manufacturer, seller or dispenser;" it's just hanging.

12 MR. FERNICH: Yeah, I remember that.

13 THE COURT: So if you'd please fix that. I don't know
14 what you're intending to say.

15 MS. MORTAZAVI: Your Honor, we propose adding "you may
16 consider it."

17 THE COURT: Mr. Fernich or Mr. Sercarz?

18 MR. FERNICH: I didn't hear, I apologize.

19 THE COURT: You proposed?

20 MS. MORTAZAVI: Could I read the entirety of the
21 sentence?

22 THE COURT: Yes.

23 MS. MORTAZAVI: "If other evidence establishes this
24 intended use, such as the marketing, promotion, or previous
25 labeling of the product by the manufacturer, seller or

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1 dispenser, you may consider it."

2 THE COURT: Well, why don't we say "you may consider
3 such evidence."

4 MS. MORTAZAVI: That's fine, your Honor.

5 MR. FERNICH: No objection.

6 THE COURT: Okay. Then we come down to the disputes
7 between the parties, and the first dispute, as I understand it,
8 is the definition of or the instruction with respect to when a
9 drug is misbranded. As I understand it, the government is
10 proposing for me to include the following words "which includes
11 a lot number and an expiration date, list of active
12 ingredients."

13 I do think, and as I understand it, the defense
14 objects to that because that comes out of the regulations and
15 not out of the statute itself, correct?

16 MR. FERNICH: To be candid, Judge, a lot of this has
17 been overtaken by intervening events at trial. That was part
18 of my objection.

19 THE COURT: All right. Well, then I'd ask you to go
20 back and get me --

21 MR. FERNICH: I'm looking at what I wrote right now.
22 I'll just maintain what I wrote there.

23 THE COURT: All right. Well, my point is the
24 following, then. The indictment certainly references the CFR.
25 The defendants questioned witnesses about the CFR, and I think

1 you've acknowledged that, Mr. Fernich.

2 MR. FERNICH: Yes.

3 THE COURT: And in any event, when you have a
4 statutory scheme that delegates to an agency rule making or
5 regulatory authority, it seems to me that those regulations are
6 part of the statutory scheme. Having said that, I really -- I
7 tried to parse this phrase by phrase, and I honestly do not
8 think the government needs or is necessarily entitled to this
9 list of lot number, expiration date and list of active
10 ingredients.

11 With respect to the next dispute in these two
12 competing paragraphs, the government calls it a "prescription
13 animal drugs" and the defendants call it the "veterinary
14 prescription drug." I believe the statute uses "veterinary
15 prescription drug;" does it not?

16 MS. MORTAZAVI: Your Honor, the statute uses it in the
17 title. However, "prescription animal drug" is the nomenclature
18 used by FDA CVM, and it's used in other cases that involve
19 animal drugs that require a prescription. It is that way in
20 the Rojas case, before the Third Circuit, in the lower court,
21 and before the Supreme Court. It is the nomenclature, as I
22 mentioned, that Dr. Bowman uses and the FDA CVM uses.

23 THE COURT: Prescription animal drugs?

24 MS. MORTAZAVI: Prescription animal drugs. Because
25 the categories that FDA CVM recognizes are animal drugs and

1 drugs, which are drugs intended for man. So I acknowledge
2 there is a caption that reads "veterinary prescription drugs"
3 but that simply doesn't track the common usage or the common
4 understanding of how that term is referenced.

5 THE COURT: I see you nodding your head, Mr. Fernich.
6 Are you in agreement?

7 MR. FERNICH: So, well, I'll let Ms. Mortazavi finish.

8 THE COURT: Yes. I didn't realize. I'm sorry.

9 MS. MORTAZAVI: One final point, your Honor, which is
10 "veterinary prescription drugs," given the facts here, is
11 slightly misleading, or at least can be slightly confusing
12 because the defendant is a veterinarian. He does distribute
13 drugs.

14 THE COURT: Well, I think that's why they want it.

15 MS. MORTAZAVI: I agree, but that's not --

16 THE COURT: All right. I understand.

17 Mr. Fernich, I do think Ms. Mortazavi may be right on
18 this.

19 MR. FERNICH: Okay. So let me say three quick things.
20 Okay? Of course, your Honor is correct, as a general matter
21 about deference to administrative regulations, Chevron,
22 et cetera, et cetera. I lodged this --

23 THE COURT: No, I'm not saying that's under Chevron.
24 I'm saying if you have a statute. This is not construction of
25 the statute. This is a question of whether the regs are part

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1 of the statutory scheme. That's a different question than
2 Chevron.

3 MR. FERNICH: Right. So in part, I bring this
4 objection because there is, obviously, an ongoing debate in the
5 Supreme Court about the appropriateness of relying upon
6 administrative regulations as the predicate for a criminal
7 conviction. That's for a different audience.

8 If your Honor would dig into these particular
9 regulations, which I have the distinct displeasure of having
10 done, several of these regulations at issue were not passed
11 pursuant to ordinary notice and comment and rule making under
12 the APA, which is the second reason why I included these
13 objections.

14 It's a case called Franks Compounding out of Florida,
15 a federal case that traces this history in 80 pages of detail,
16 but leaving that to one side, I do agree with Ms. Mortazavi
17 that phrase "prescription animal drugs" crops up in these other
18 cases. And it was a puzzlement to me; so I tried to find the
19 source for it in either the CFR or the FDCA, and I can't find
20 it. The only thing I find in the statute is the phrase
21 "veterinary prescription drug."

22 THE COURT: No, but that's in the caption.

23 MR. FERNICH: Right, but it's also -- and I can find
24 it for the Court in a minute -- it's also in the CFR, and it's
25 also in the AVMA model code, which talks about the CFR. So I

1 don't know where -- to be candid, I don't know where this
2 phrase -- I understand it may be something that the agency uses
3 internally, or even on its website.

4 But in the statutes, the regs, and even in the AVMA
5 model code, which discusses the CFR and what they call the
6 AMDUCA, which is the extra-label use exemption that was put
7 into 360(b) in 1996 or '97 for veterinarians, the only phrase
8 that I've seen is "veterinary prescription drug."

9 I was nodding my head because I agree with
10 Ms. Mortazavi that in those other two cases, like Sloane and
11 Rojas, that phrase "prescription animal drug" comes up. I'm
12 just not sure of the origin for it, and this accurately tracks
13 the statute. It tracks the CFR.

14 I did word searches for these things, and it also
15 tracks the AVMA model code. I just don't see that phrase
16 anywhere in things that we're charged with violating. And,
17 yeah, I do prefer this formulation, as the Court has intuited,
18 but I also think it's faithful to the statute. I just don't
19 see that in there anywhere.

20 MS. MORTAZAVI: And, your Honor, if I may make one
21 observation?

22 THE COURT: Go ahead.

23 MS. MORTAZAVI: We are looking to simplify things for
24 the jury, and we are looking at the evidence that the jury has
25 heard. And the jury has heard testimony from Dr. Bowman that

1 these are referred to as animal drugs and animal drugs that
2 require a prescription.

3 It simply seems more intuitive for the jury to hear
4 the terms that they have heard previously over the course of
5 this case, regardless of what Mr. Fernich can cite to with
6 respect to what is in existence in either regulations or
7 guidance on the internet.

8 We are looking at what this jury is going to
9 understand and digest, and I think "prescription animal drugs"
10 is more faithful to the evidence that's been presented.

11 THE COURT: All right. If you look at -- I'm going to
12 go with the government's formulation of "prescription animal
13 drug" and the reason I'm doing it is the following. I mean,
14 Mr. Fernich, your's is kind of whole academic thing about --

15 MR. FERNICH: Your Honor, it's not the biggest point
16 in the world, and I'm not sitting here trying to split hairs or
17 quibble over it. I'm really not. I just wondered how it had
18 gotten --

19 THE COURT: All right. Are you consenting, then?

20 MR. FERNICH: No, I'm not.

21 THE COURT: Let me tell you my thinking. If you look
22 at 21, United States Code, Section 321, which is the definition
23 section, when it talks about the term "new drug," it uses
24 repeatedly the expression "animal drug." And if you look at
25 the definition of a drug, as I recall, it talked about having

1 an impact on the body of an animal.

2 I mean, it's throughout the whole statutory scheme
3 that what it's intended to regulate is substances that have an
4 impact. The term "drug" means, and then if you read it, it's
5 having an impact on the system or the body of a human or an
6 animal respectively. And this whole case is about the impact
7 of drugs, the use of drugs that impact animals.

8 So it just is simpler and clearer for the jury to talk
9 about "prescription animal drugs," and I do think, even though
10 the title "veterinary prescription drug" may be used in the
11 statute, throughout the body of this whole series of
12 interrelated statutes, including most importantly the
13 definitions in 321 which are incorporated into the substantive
14 charges, track more closely to the government's proposal.

15 Now, the next issue you both have here is -- blue is
16 the government, right?

17 MS. MORTAZAVI: Yes, your Honor.

18 THE COURT: The government is proposing "failed to
19 have the term 'Rx only.'" And the defendant proposed in red,
20 "It lacks the statement 'Caution: Federal law restricts this
21 drug's use by or on the order of a licensed veterinarian.'"

22 Does anyone want to be heard?

23 MR. FERNICH: Judge, I understand your prior ruling,
24 and I'm not -- I get it. This is not going to be a point that
25 makes or breaks the case. I just want to put this on the

1 record. Okay?

2 In the AVMA it's model code discussing VCPR, the
3 Veterinary Client Patient Relationship, as used in 360(v) of
4 Title 21, they used the phrase "veterinary prescription drug"
5 means a drug that may not be dispensed without the prescription
6 of a licensed veterinarian, and that bears the label statement
7 "Caution: Federal law restricts this drug's use by or on the
8 order of a licensed veterinarian."

9 THE COURT: What are you reading from?

10 MR. FERNICH: I am reading from the American
11 Veterinary Medical Association.

12 THE COURT: That's not a statute.

13 MR. FERNICH: No, but what this code is, and what we
14 thought we elicited from Dr. Bowman on the examination -- and I
15 can give it to you, your Honor -- this is the template for all
16 the state veterinary practice codes, and it also harmonizes
17 those codes to, quote, both the FDCA and the interpretive
18 provision in the FDCA in 21 CFR and this is tracking back now
19 to the 360(b) provision in the FDCA, and it's mirroring the
20 language in -- it's mirroring the language in there that we're
21 talking about right now, the dispute, such as it is, a very
22 minor dispute, "Caution: Federal law restricts this drug to be
23 used by or on the order of a licensed veterinarian."

24 So this phrase "veterinary prescription drug" has
25 meaning in the statutory context and also in the veterinary

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1 profession. And this is what veterinarians consult, and I'm
2 happy to hand it up or tell your Honor where to look at it.
3 I'm not speaking out of school here. It's construing right
4 here, it says, extra-label use is the --

5 (Continued on next page)

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1 THE COURT: But what you're reading is not the
2 statute.

3 MR. FERNICH: But it's defining the terms in -- it's
4 using the same language in the statute. For example, 211,
5 extra label use, which is the term from 360(b), is defined as
6 written in the Federal Regulation 21 CFR --

7 THE COURT: Which you don't want me to consider.

8 MR. FERNICH: We're past that now.

9 -- 533.8, 2018, which implements the Animal Medicinal
10 Drug Classification Act, AMDUCA, with the exception that the --
11 what I'm trying to say is AMDUCA is 360(b) of the FDCA, which
12 was implemented in 1996, and that's the provision for extra
13 label use. So it's defining the terms or expanding upon the
14 terms as used in the statute so that veterinarians know what
15 they're doing.

16 I don't know where this -- I get that somewhere in FDA
17 parlance in the agency there's this term "new animal drug."

18 THE COURT: No, it's in the statute.

19 MR. FERNICH: I mean prescription animal -- I'm sorry,
20 there's a lot of different terms floating around here, this
21 term "prescription animal drug," I get within the agent somehow
22 it's a term they're using.

23 THE COURT: It's not just at the agency. I pointed
24 you to it in the definitions in Section 321 of Title 21.

25 You have my ruling on the prescription animal drug.

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1 On the next one, is there a reason you can't combine
2 these? It says fail to have the term RX only or caution
3 federal law predicts this drug.

4 MS. MORTAZAVI: Your Honor, our concern is the
5 verbiage proposed by the defendants may not track the statute
6 or the regulations. I believe the regulations require the
7 following language: Caution, federal law prohibits dispensing
8 without prescription.

9 It's a fine distinction. the government has no
10 opposition to including both proposals, but I want to make sure
11 that it's accurate.

12 THE COURT: Can you read it to me again, what you were
13 just reading from? It's the CFR, right?

14 MS. MORTAZAVI: I believe so, your Honor, caution,
15 federal law prohibits dispensing without prescription.

16 MR. FERNICH: What section of the CFR is that?

17 MS. MORTAZAVI: Your Honor, why don't we do this and
18 have the parties go back --

19 THE COURT: I would like you to do that because you're
20 saying, Mr. Fernich, it's not that big a deal, it's not a major
21 issue. Some of this, frankly, I think you're fighting about
22 semantics or labels without any meaning, I really do.

23 MR. FERNICH: I don't disagree with the Court. As I
24 indicated earlier, things have changed with the addition of the
25 evidence, but the fact is this RX only comes from a different

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1 provision of the statute that deals with human drugs. And as
2 the witness pointed out, and as is I don't think a subject of
3 dispute, there are slightly different laws applicable to vets
4 and MDs. They don't really matter as the evidence has come out
5 for purposes of this case, but if we're going to get into
6 statutory terminology, I'm not sure we need to anymore, we
7 should try to do it right to the extent that we can, and I
8 acknowledge that this is not easy.

9 THE COURT: Okay. So I'm going to leave you to go
10 back and confer with respect to request 10, the paragraph about
11 when a drug is misbranded.

12 MS. MORTAZAVI: Where it fails to have the
13 prescription statement. This is Section III.

14 THE COURT: Well, I meant all of it, because it sounds
15 like Mr. Fernich may be backing off of some of what he
16 proposed. If he doesn't, he doesn't.

17 MS. MORTAZAVI: Understood.

18 THE COURT: And if not, you have my ruling on some of
19 it.

20 MS. MORTAZAVI: Thank you.

21 THE COURT: Page 21. I am not including the red
22 language that says you must be unanimous. However, as to the
23 way or ways in which the drug were misbranded, that is not the
24 law. The defendant is not charged with the substantive
25 offense, he's charged with conspiracy, and then there are a

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1 number of alleged objects and overt acts. There does not need
2 to be agreement with respect to the overt acts. I think the
3 law is pretty clear on that. So I'm not including the language
4 in red that you must be unanimous, however.

5 Everyone with me?

6 MS. MORTAZAVI: Yes, your Honor.

7 MR. FERNICH: Understood.

8 THE COURT: The next disagreement is about the term
9 "adequate directions for use." And as I understand the
10 dispute, the government wants to insert the word "lay" before
11 the word "person" and say a lay person can use, whereas the
12 defendant wants to say under which a person, not qualified to
13 be a lay person, administering or using the drug can do so
14 safely.

15 Am I understanding the distinction correctly?

16 MR. FERNICH: Yes.

17 THE COURT: But you also have a note that we shouldn't
18 even define it.

19 MR. FERNICH: I would be happier with all of it out,
20 but if we're going to do it, I prefer my formulation. And I
21 don't think "lay person" appears in the statute, and my problem
22 with it is that trainers, the evidence in this case shows
23 particularly the witness who is a trainer who testified that
24 his father has, rightly or wrongfully, taught him out to give
25 horses shots when he was in knee pants, trainers aren't really

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1 lay people.

2 Again, I know that the AVMA model code isn't in
3 evidence, but we asked Dr. Bowman questions about it. The
4 trainer is generally an owner's -- clients are owner's agents,
5 and they're not people off the street with no experience with
6 horses or animals. As a functional matter, obviously they have
7 been giving shots forever, but leaving that to one side, they
8 have substantial, substantial knowledge about animal physiology
9 or horse physiology that the average Joe on the corner just
10 doesn't have. This is their life's calling. And to me it's
11 misleading to throw the term "lay person" in there. A lot of
12 clientele, they weren't your average Joes.

13 MS. MORTAZAVI: Your Honor, I don't want to belabor
14 this point. We're happy take out the term "lay." I think
15 Mr. Fernich is misapprehending what the instructions are
16 supposed to do. The term "adequate directions for use" refers
17 to what the FDCA contemplates with respect to labeling. It is
18 not tailored to trainers or people who may have exposure to
19 some kind of medical field about being a qualified medical
20 profession.

21 MR. FERNICH: I take that point. I don't know where
22 this lay person bit is coming from.

23 THE COURT: We're taking out the word "lay."

24 MS. MORTAZAVI: Correct, your Honor.

25 THE COURT: And then the distinction is: Are we

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1 saying can use the drug safely or saying administer or use the
2 drug safely? That's the distinction we're talking about.

3 MS. MORTAZAVI: We're happy to include "can administer
4 or use."

5 THE COURT: So we'll go with the defendant's
6 formulation of the first paragraph, the term adequate direction
7 for use.

8 Okay?

9 MR. FERNICH: Yes.

10 THE COURT: Then I already said that I will say
11 prescription animal drug, not a veterinary prescription drug,
12 so wherever that lands it has to be consistent throughout.

13 MR. FERNICH: Understood.

14 MS. MORTAZAVI: Yes, your Honor.

15 THE COURT: And then red again is the defendant?
16 In the defendant's formulation you're not even
17 capturing an animal drug.

18 MR. FERNICH: Where are you, now, your Honor?

19 THE COURT: I'm in the competing paragraphs, a product
20 is.

21 MR. FERNICH: I see where you are.

22 THE COURT: I told you I will call it a prescription
23 animal drug.

24 Then I don't think you have any more disagreement, do
25 you? Ah, the disagreement is the defendants want to say a

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1 veterinary prescription drug, but we said it will be
2 prescription animal drug, is a drug that can be dispensed only
3 on the lawful written oral order -- you're inserting the word
4 dispense, whereas the government says can be administered.

5 MR. FERNICH: I see.

6 THE COURT: I don't think the statute is limited to
7 dispensing.

8 MR. FERNICH: No, whatever the statutory language says
9 I want to track that.

10 MS. MORTAZAVI: Your Honor, I want to be clear that
11 the reason that we had included in here this particular
12 language, which contemplates that a veterinarian could directly
13 administer a prescription drug to an animal, and that would be
14 a permissible method of --

15 THE COURT: I didn't know. So I lost this, I'm sorry.
16 You have the additional language: Can be administered only by
17 a licensed veterinarian in the course of the veterinarian's
18 professional practice.

19 MS. MORTAZAVI: Correct.

20 THE COURT: Which doesn't appear in the defendant's
21 draft and that should be included. I'm sorry.

22 MS. MORTAZAVI: Yes.

23 THE COURT: Then the defendant wants to insert --
24 that's the only distinction then.

25 MS. MORTAZAVI: That is the only distinction, your

1 Honor. And the reason for it is because of the *Rojas* case and
2 the solicitor general's confession of error. This is
3 consistent with that. The *Rojas* jury instructions are now
4 going to be reconsidered by the Third Circuit. I don't think
5 that we have to invite an appellate issue.

6 THE COURT: But I think the way you have this phrased
7 is not correct, because I think *Rojas* deals with if it's a
8 veterinarian who is administering it, it has to be in the
9 course of the ordinary practice, but it doesn't have to be on a
10 written or oral prescription because it's in the ordinary
11 course of that veterinarian's practice. You say that can be
12 administered only by a licensed veterinarian in the course of
13 that veterinarian's practice, and I don't think that's correct,
14 I think it can be administered by somebody else if they have a
15 prescription from a veterinarian.

16 MS. MORTAZAVI: And so the --

17 THE COURT: But your "only" is in the wrong place.

18 MS. MORTAZAVI: We can take out "only" to the extent
19 it's confusing, your Honor. We did intend to encapsulate both
20 categories. We have here: Can be administered only by a
21 licensed veterinarian in the course of the veterinarian's
22 professional practice or dispensed only upon the lawful written
23 or oral order of a licensed veterinarian.

24 THE COURT: But my point is after the "or" you're
25 losing the administered concept. So when a veterinarian writes

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1 a prescription and gives it to someone else who knows how to
2 administer it, that's okay.

3 MS. MORTAZAVI: Yes, and that's what was intended by
4 dispensed, because the veterinarian --

5 THE COURT: But I don't think it captures it. I think
6 you have to say: Can be administered you a licensed
7 veterinarian only in the course of that veterinarian's
8 professional practice, right?

9 MS. MORTAZAVI: Yes.

10 THE COURT: Or administered and dispensed or dispensed
11 upon a lawful written or oral order of a licensed veterinarian
12 in the course of that veterinarian's professional practice.

13 MS. MORTAZAVI: And that structure is perfectly fine
14 for the government.

15 THE COURT: Defendant?

16 MR. FERNICH: Okay, I object to this because it's
17 contrary to the language. This is attempting to charge under
18 21, U.S. Code, 353(f), whatever you want to call it, this is
19 mirroring the language in the section that's captioned:
20 Veterinarian Prescription Drugs.

21 THE COURT: Let me catch up with you.

22 MR. FERNICH: Yes.

23 MS. MORTAZAVI: Your Honor, may I have a minute with
24 defense counsel for a minute while the Court finds its place?

25 THE COURT: Yes.

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1 (Pause)

2 MS. MORTAZAVI: Your Honor, thank you for giving us
3 the time to confer. I believe that the parties can agree to
4 amend this language to demonstrate that it is an either/or
5 scenario. So the proposed language would be a prescription
6 animal drug is a drug that either be administered by a licensed
7 veterinarian in the course of the veterinarian's professional
8 practice or administered or dispensed upon the lawful written
9 or oral order of a licensed veterinarian in the course of the
10 veterinarian's professional practice.

11 Now I would submit that including "administered or
12 dispensed" is repetitive and that we may be able to stick to
13 the language "dispensed upon the lawful written or oral order,"
14 but I'm happy to hear the Court's reaction to the proposed
15 amendment.

16 MR. FERNICH: I don't want the second "administered"
17 in there.

18 THE COURT: Neither does Ms. Mortazavi, correct?

19 MS. MORTAZAVI: Correct.

20 THE COURT: We'll take it out. It will now read: A
21 prescription animal drug is a drug that can either be
22 administered by a license veterinarian in the course of the
23 veterinarian's professional practice or can be dispensed --

24 Are we taking out "only?"

25 MS. MORTAZAVI: We would ask that it be he left in,

1 your Honor.

2 THE COURT: Only upon the lawful written or oral order
3 of a licensed veterinarian in the course of the veterinarian's
4 professional practice.

5 MR. FERNICH: No objection.

6 THE COURT: Perfect.

7 Okay. On page 23, I'm going to run through a couple
8 of these clean up things quickly. There's a numbered list 1,
9 2, 3, 4, 5.

10 In number 4, I think you need the word "the" in front
11 of the second product. It says prior to the misbranding or
12 adulteration of the product, the product or a compound of the
13 product had moved or been shipped in interstate commerce is the
14 way it should read.

15 MS. MORTAZAVI: And your Honor, to be clear, I read
16 the word "component" on the page, did you intend to replace
17 that with compound?

18 THE COURT: No, I'm sorry, I misspoke, I meant
19 component.

20 MS. MORTAZAVI: Understood, your Honor.

21 THE COURT: Mr. Fernich, Mr. Sercarz?

22 MR. FERNICH: No problem.

23 THE COURT: Okay. The next area of disagreement and
24 the next comment that I have is coming over to page 26. This
25 is really just a stylistic thing. Could you please start a new

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1 paragraph before "To act with intent to defraud" in the middle
2 of the first paragraph on line 3 towards the end.

3 MS. MORTAZAVI: Yes, your Honor.

4 THE COURT: But more substantively, the fact that --
5 the defendant proposes that we insert in the second paragraph a
6 fact is "material," in quotes, if a reasonable person under the
7 circumstances would consider it important in making a decision
8 or determining a course of action.

9 First of all, Mr. Fernich, I don't know what you mean
10 when you say *Hebert* charge.

11 MR. FERNICH: A *Hebert* charge is I think the
12 government -- I think the government relies on it elsewhere or
13 I cited it.

14 THE COURT: Is that a case?

15 MR. FERNICH: Yeah. I must have cited it in one of
16 the bubbles above.

17 THE COURT: Is it a securities fraud case?

18 MR. FERNICH: No, it's a veterinarian -- it's a
19 veterinarian charged under the FDCA. There's not too many of
20 these charges.

21 THE COURT: All right. I am not inclined to give
22 this. This, to me, reads like a charge for a securities fraud
23 case.

24 MR. FERNICH: So I cited it up in the bubble. The
25 first of the cites occurs on the bubble at page 21.

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1 THE COURT: You want to read into the record what the
2 cite is so I don't keep flipping?

3 MR. FERNICH: Sure, *U.S. V. Hebert*, 17 CR 39, Western
4 District of Louisiana, November 6, 2017, ECF 104.

5 And what page are we on now of this charge?

6 THE COURT: 26.

7 MR. FERNICH: So page 15 of the *Hebert* charge at the
8 cite that I just mentioned.

9 THE COURT: All right. I will take a look at it, but
10 my current view is I'm not including that.

11 MR. FERNICH: I just pulled it almost verbatim from
12 there.

13 MS. MORTAZAVI: And your Honor, two points to make on
14 this. We had pulled our language from the *Lasher* case that
15 your Honor had referenced. That is *U.S. v. Lena Lasher* in this
16 district before Judge Buchwald. If the Court is inclined to
17 include this language or something similar or at least this
18 concept proposed by defense counsel, we would like to be heard
19 on a potential amendment to this proposal so that it tracks the
20 facts here. Frankly, the reference to a decision does not
21 appear to be on all fours with --

22 THE COURT: My ruling is I'm not going to include it
23 unless I go back and look at the case and something changes my
24 mind. But out of curiosity, why isn't *Lasher* listed in your
25 list of authorities on the next page?

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1 MS. MORTAZAVI: It should have been, your Honor, I
2 apologize for that.

3 THE COURT: Okay.

4 MR. FERNICH: The language from *Hebert*, and you will
5 see it on page 15, and this is the intent to defraud or mislead
6 provision of the FDCA at issue, to act with "intent to mislead"
7 means to acts with the specific intent to create a false
8 impression by misstating, omitting or concealing material
9 facts. A fact is "material" if a reasonable person under the
10 circumstances would attach importance to it in making a
11 decision or determining a course of action.

12 THE COURT: Okay. Thank you. But I'm going to look
13 at the whole case. The facts may be completely inapposite.

14 Now are you all going back and revising these based on
15 your lesser include offense charge or not? The rest of this,
16 is it impacted by the lesser included offense or is that a
17 separate insert?

18 MS. MORTAZAVI: It would be a separate insert.

19 THE COURT: I see.

20 MS. MORTAZAVI: It would impact the numbering but not
21 the substance.

22 THE COURT: So when we look at the next area of the
23 disagreement is on page 27. The government wants to say state
24 regulators, the defendant wants to say state racing and drug
25 regulators. The government wants to say some other

1 identifiable federal or state government authority, the
2 defendant wants to say the Food & Drug Administration, U.S.
3 Customs & Border Protection or other federal drug enforcement
4 authorities.

5 I'm going to use the defendant's language.

6 MS. MORTAZAVI: Your Honor, would it be possible,
7 rather than restricting it to federal drug enforcement
8 authorities, to enlarge that category? I believe that's
9 consistent with this Court's opinion and the language of the
10 FDCA which is not constrained in the way that language suggests
11 it is.

12 THE COURT: I have to say this, Customs & Border
13 Protection isn't normally thought of as a drug enforcement
14 authority. It has that within its ambit, so I do see your
15 point about "other." So you want me to say other federal
16 authorities instead of other federal drug enforcement
17 authorities?

18 MS. MORTAZAVI: Correct, your Honor.

19 THE COURT: Mr. Fernich?

20 MR. FERNICH: So we object to that. And the reason
21 for this is that I went back and studied your Honor's opinion
22 very carefully. And in the litigation leading up to that
23 opinion, the government took the position that Ms. Mortazavi
24 just enunciated, which is that the statute -- the phrase
25 "intent to defraud or mislead" is entirely unconstrained and

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1 limitless, and the Court left that question open, did not
2 resolve that question.

3 THE COURT: I didn't feel I had to go that far.

4 MR. FERNICH: Understood. I'm aware of it.

5 THE COURT: I think that's what I said in the opinion.

6 MR. FERNICH: Yes, I understand. And so the way that
7 I annotated the request to charge was to loop in there
8 everything that I thought your Honor had ruled, every entity
9 that your Honor at that point had ruled was a cognizable
10 victim, direct or indirect.

11 THE COURT: I'm going to go with the defendant's
12 language. In fairness, I also believe it tracks the
13 indictment, which I studied very carefully in ruling on the
14 motion to dismiss. So we're going with the defendant's
15 language.

16 MS. MORTAZAVI: Your Honor, may I make one point?

17 THE COURT: You can make a record, sure.

18 MS. MORTAZAVI: I understand the Court's ruling, but,
19 for example, it is not necessarily clear if we delineated as a
20 federal drug enforcement authority that the FBI, for example,
21 or the U.S. Attorney's Office would be a contemplated victim,
22 and the defendant has been charged with continuing his crime
23 following his arrest while he was on bail when he was aware of
24 the FBI's existence, he was aware of the U.S. Attorney's
25 Office, and he was under the supervision of the Court.

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1 THE COURT: But you didn't argue that in connection
2 with your opposition to the motion to dismiss.

3 MS. MORTAZAVI: I understand, your Honor.

4 THE COURT: The indictment was after, but you didn't
5 argue that to me. You really didn't.

6 MS. MORTAZAVI: I understand, your Honor.

7 THE COURT: I'm going to go with the defendant's
8 language.

9 Request No. 12, there's a lot of edits to reflect
10 Ms. Giannelli no longer being here. Nothing substantive for
11 me.

12 Request 13. Obviously you need to edit the first
13 paragraph where you have Giannelli and Fishman in bold. If you
14 come down to paragraph 4 on the first line, I think the word
15 "not" is missing.

16 MS. MORTAZAVI: Sorry, your Honor, what page are you
17 referring to?

18 THE COURT: 32, request No. 13, fourth paragraph, line
19 1. In that regard, you should bear in mind that you need reach
20 unanimous agreement. I think you're missing the word "not."

21 MS. MORTAZAVI: I believe that's correct, your Honor.

22 THE COURT: Mr. Fernich?

23 MR. FERNICH: Yes.

24 THE COURT: All right. Request No. 14, you have a
25 bracketed "if applicable." It's conscious avoidance Counts One

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1 and Two. For the Court, it seems it's arguably applicable. I
2 just want to confirm on these where you have bracketed notes.

3 Are we in agreement?

4 MS. MORTAZAVI: Your Honor, we would contend that it
5 is applicable.

6 THE COURT: Yeah. That's what I said, I think it is
7 applicable. I'm wanting everyone to agree or not agree.

8 Mr. Fernich?

9 MR. FERNICH: No, we object to it and don't think
10 there's a record predicate for it. We think he either did it
11 with a bad intent and he did it deliberately knowing exactly
12 what it is, we don't see how he stuck his head in the sand
13 about anything here. We don't see a record predicate for that.

14 MS. MORTAZAVI: Your Honor, if I may respond to that.
15 There is certainly the insinuation that Ms. Giannelli was
16 acting on her own and of her own volition in distributing Seth
17 Fishman's drugs. That's an argument that we have to contend
18 with.

19 I also anticipate that there will be -- given the
20 objections to entering through the racing regulations, for
21 example, there may be arguments made that the defendant was
22 unaware of the regulations that applied to those participating
23 in horseracing. So this is certainly applicable as to
24 co-conspirators and their activities and their further
25 distribution of the defendant's drugs. Ms. Giannelli was not

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1 the only distributor. And the testability of those drugs and
2 the intent of the consumers to evade racing regulations, both
3 of those are directly on point.

4 THE COURT: So convincing to me -- and then I will let
5 you make your record, Mr. Fernich -- is the fact that you
6 argued in the opening statement -- and I think it was not
7 proper, but you did it -- that the whole statutory scheme in
8 the FDCA is so incomprehensible, it's this patchwork that he
9 couldn't understand.

10 MR. SERCARZ: Your Honor, may I be heard with regard
11 to that opening statement? It was mine, and I think you will
12 find that my description of the statutory scheme occurs in two
13 places. It occurs --

14 MR. FERNICH: Can I speak with Maurice for just one
15 second before we continue?

16 Let me make sure we're on the same page.

17 THE COURT: Gentlemen, let's not do this. Finish what
18 you want to say then I will hear you, Mr. Fernich.

19 MR. FERNICH: Go ahead, I don't want to waste your
20 time.

21 MR. SERCARZ: The first time that I --

22 THE COURT: Where are you looking Mr. Sercarz? Tell
23 me a page, please?

24 While you're looking, I'm going to say two things. It
25 is not the role of an opening statement for you to comment on

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1 the law. And that's what you were doing. Second, it is not
2 the role in an opening statement for you to argue, and that's
3 what you were doing. That's my objection. But it is what it
4 is. There was no objection from the government and so it came
5 in. So I don't know we're wasting time on it now.

6 MR. FERNICH: So here's my response to what the Court
7 had to say. Ignorance of the relevant regulations isn't enough
8 for a conscious avoidance charge, he has to show willful
9 blindness, deliberate steps taken to avoid knowing. That's
10 what the essence of conscious avoidance is. And I'm looking up
11 the pivotal Supreme Court case, it's a civil case from several
12 years ago but it's routinely been applied in criminal cases.
13 It's not enough that he doesn't know, he has to deliberately
14 shield himself from learning the applicable regulations. So
15 we're perfectly permitted to argue that the regulations are so
16 Byzantine that somebody even acting in good faith could screw
17 them up honestly. That's a different argument.

18 THE COURT: I don't think you can argue that.

19 MR. FERNICH: Sure we can.

20 THE COURT: Look, at the end of the day, the problem
21 Dr. Fishman has is that he was engaging in a business not as a
22 veterinarian but as a manufacturer of drugs. If you're going
23 to engage in the business of manufacturing drugs, you're
24 charged with knowing what the rules and the regulations and the
25 guidelines are.

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1 MR. FERNICH: Well, it's for the jury to determine.

2 THE COURT: I agree with that. I agree with that. I
3 don't mean to say it's a foregone conclusion, I mean that's the
4 charge though.

5 MR. FERNICH: I understand, but the jury can
6 determine -- there are multiple possibilities that a jury could
7 determine. The jury could determine that he was making a good
8 faith effort to practice veterinarian medicine and that he
9 screwed it up.

10 MR. ADAMS: Sorry to interject, Mr. Fernich. The
11 question of whether we can carry our burden on the willful
12 blindness theory is different than the question of whether or
13 not it's proper to include it in the charge.

14 THE COURT: I agree. And Mr. Fernich, you didn't
15 object to this.

16 MR. ADAMS: Sorry, if I could make this part of the
17 record. The only thing that's required to include as part of a
18 charge is that knowledge be put at issue, and it's been put in
19 issue in multiple ways, as the Court mentioned.

20 MR. FERNICH: There has to be, though -- the reason we
21 didn't object is because it says "if applicable," which is
22 right. And that depends on the way the evidence develops at
23 trial. There's no evidence in the record, none, that he took
24 deliberate steps to avoid learning of the regulations. That's
25 what conscious avoidance is, not unaware of the regulations.

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Charge Conference

1 THE COURT: We're going bring this to a close at some
2 point, so --

3 MR. SERCARZ: Your Honor --

4 THE COURT: Hold on. Don't keep interrupting each
5 other.

6 By the close of -- today is Friday, it's 3:35. By
7 tomorrow morning you can submit a brief, and I mean brief,
8 letter. Mr. Adams is telling me the law says knowledge is at
9 issue. You're telling me the law says there has to be some
10 showing beyond that. I honestly don't know the answer, so you
11 each can have the opportunity to give me something, no more
12 than two pages in writing, and I will make a decision before we
13 charge the jury on Monday.

14 So please keep including it. My current inclination
15 is that it is applicable.

16 MR. ADAMS: Your Honor, in addition to the regulations
17 themselves, there have been cross-examinations and issues put
18 in front of the jury with respect to whether Dr. Fishman knew
19 that his clients were using these drugs in advance of races, as
20 opposed to breezing or exercise. That's another way in which
21 the question of knowledge has been put in issue here, whether
22 Ms. Giannelli --

23 THE COURT: I don't think that's what they were
24 arguing. I think they are arguing that the strenuous exercise
25 label applies to breezing, not to a race.

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Charge Conference

1 MR. ADAMS: Correct. Then the question is: Does
2 Dr. Fishman know that his trainers have effectively gone rogue
3 on him? That's been put at issue.

4 THE COURT: Here's why right now this is in. That's
5 my ruling as of now. And I will let you put in by tomorrow
6 morning a two-page letter from either side convincing me
7 otherwise. But you quote on the last page: A conscious
8 avoidance charge is appropriate where the defendant claims a
9 lack of knowledge of the relevant acts but the surrounding
10 circumstances would permit a reasonable juror to conclude that
11 the defendant should have known about them.

12 You did certainly try to create the impression that
13 Lisa Giannelli was out selling things and doing things on her
14 own. And yet there's record evidence that refutes that. So
15 there is a question with respect to that alone. That's just
16 one example. So you can submit something tomorrow by tomorrow
17 morning in writing but as of now it's in.

18 MR. SERCARZ: In less than 30 seconds, point of
19 personal privilege with me --

20 THE COURT: Go ahead.

21 MR. SERCARZ: -- if you look at page 39 of the
22 transcript, in my opening statement --

23 THE COURT: What day?

24 MS. MORTAZAVI: I believe he means the first day.

25 MR. SERCARZ: January 20.

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Charge Conference

1 THE COURT: I don't know if I have it here.

2 MR. SERCARZ: I could read it to you, Judge, or I
3 could hand it up to you.

4 THE COURT: Go ahead.

5 MR. SERCARZ: The reference to the regulations and the
6 regiment occurs twice in my opening statement. The first time
7 I speak about it even tangentially, I say that with respect to
8 the new animal drugs that the government has described to you,
9 on the issue of whether Dr. Fishman, a small independent
10 creator and distributor of animal products, met all of the many
11 and varied requirements and regulations of the Food, Drug &
12 Cosmetic Act, as implemented by the FDA, I respectfully submit
13 that he did not. And I will tell you up front that he did not.

14 THE COURT: Right, but I think --

15 MR. SERCARZ: It was later in my opening statement
16 with regard to the meeting of the term "testability" that I
17 referred to what you have called the pastiche of regulations
18 and argued that my client may have been seeking to avoid
19 inadvertent positive tests on the part of his clients. It was
20 then and only then that I referred to what the Court has
21 described as an overlapping pastiche of state and federal
22 tests.

23 So on the subject of conscious avoidance and on other
24 subjects you have discussed, I don't think I have done anything
25 to change the state of play with regard to the issue of intent

1 on this opening statement.

2 THE COURT: Okay. The record is what it is,
3 Mr. Sercarz, and I don't think that I ever used the word
4 "pastiche," by the way.

5 MR. FERNICH: It's a good word.

6 THE COURT: It is.

7 MR. FERNICH: My cite is *Global-Tech Appliances*, 563
8 U.S. 754, 769, Supreme Court, (2011). While the courts of
9 appeals articulate the doctrine of willful blindness, which is
10 conscious avoidance, in slightly different ways, all appear to
11 to agree on two basic requirements: (1), the defendant must
12 subjectively believe that there is a high probability that a
13 fact exists; and (2), the defendant must take deliberate
14 actions to avoid learning of that fact. Here's the money shot
15 in the opinion: We think these requirements give willful
16 blindness an appropriately limited scope that surpasses
17 recklessness and negligence. So the Supreme Court -- and
18 earlier in this opinion talks about criminal cases -- expressly
19 endorses this formulation. Number 2, element no. 2, the
20 defendant taking deliberate actions to avoid learning of
21 whatever fact is in issue, there is no adequate record
22 predicate for that to my knowledge, and that's my objection.

23 THE COURT: Okay. Thank you.

24 Request no. 18, venue. So this is just wrong. The
25 Southern District does not include, among other places, this

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Charge Conference

1 list of counties. It includes the list of counties and that's
2 it. And I also don't know how you can ask someone to find
3 venue, even if it were right -- if you ask someone to find
4 venue when say among other places, so they don't even know what
5 you're talking about. But it's wrong. These are the list of
6 the counties. To the best of my knowledge, there's no others
7 unless someone tells me I'm missing something.

8 MR. ADAMS: You're correct. That came from a holdover
9 where only the Manhattan and the Bronx were --

10 THE COURT: All right. Page 41, this is just
11 stylistic. The paragraph that begins "The process of drawing
12 inferences," second sentence, "An inference is a deduction or a
13 conclusion that you, the jury, are permitted" -- take out "to
14 draw," and put a comma, please, are permitted, but not
15 required, to draw from the facts.

16 Charge 21. You have an "if applicable," and it says
17 in the first line: You heard reference in the arguments of
18 defense counsel in this case to the fact that certain
19 investigative techniques were not used by the government.

20 Are you contending it's applicable?

21 MR. ADAMS: If the defense is not arguing it in
22 summation, then I don't think it will be.

23 THE COURT: Mr. Fernich or Mr. Sercarz, do you have a
24 view or do you want to reserve on this, which you're entitled
25 to do, I suppose.

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1 MR. SERCARZ: No, I'm not going to argue it.

2 THE COURT: So we can take this out?

3 MR. FERNICH: Yes.

4 MR. SERCARZ: Yes.

5 THE COURT: Thank you. 22 says if applicable. All
6 available evidence need not be introduced.

7 MR. SERCARZ: It is not something what I intend to
8 argue.

9 THE COURT: So should we take it out?

10 MR. FERNICH: Yes.

11 MS. MORTAZAVI: Yes, your Honor.

12 THE COURT: 22 is out.

13 23, stipulations. You have some material in brackets.
14 I assume that was because at that point it sounded like --
15 until today it sounded like the only stipulations you had were
16 with respect to exhibits, but today you stipulated to certain
17 facts.

18 MS. MORTAZAVI: That's correct, your Honor.

19 THE COURT: So the brackets should come out?

20 MS. MORTAZAVI: That would be the government's
21 proposal.

22 THE COURT: Mr. Fernich or Mr. Sercarz?

23 MR. FERNICH: I'm sorry, I was dealing with my
24 colleague about logistics for his departure. Can you repeat
25 that, please?

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Charge Conference

1 THE COURT: On request 23 --

2 MR. FERNICH: Yes, ma'am.

3 THE COURT: -- I was saying the bracket should come
4 out now because today you stipulated to certain facts. Before
5 you were just stipulating about the admissibility of exhibits.

6 MR. FERNICH: Did we do any fact stipulations?

7 THE COURT: Yes, to the date of arrest and the date of
8 bail.

9 MR. SERCARZ: Agreed.

10 THE COURT: So the brackets -- the material remains,
11 the brackets themselves come out.

12 24. Charts and summaries. I don't recall any charts
13 and summaries.

14 MS. MORTAZAVI: No, your Honor, it's not requested by
15 the government.

16 THE COURT: Mr. Fernich or Mr. Sercarz?

17 MR. FERNICH: It's fine.

18 THE COURT: Take it out?

19 MR. FERNICH: Yeah, take it out. Anyway we can
20 shorten this.

21 THE COURT: I agree. That's why I'm taking the time
22 to do this.

23 28. Preparation of witnesses. I just flagged this
24 for myself because, to be honest, I didn't remember a lot of
25 discussion about preparation of witnesses, although I guess

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Charge Conference

1 there might have been some. I don't have any problem with it,
2 but I want to make sure you all want this.

3 MS. MORTAZAVI: Your Honor, I believe there were
4 questions about proffer sessions that at least one witness had
5 engaged in. I believe the proffer agreement may have been --
6 certainly shown to the defendant, I think it may be Defense
7 Exhibit 1.

8 THE COURT: Okay. Mr. Fernich, are you in agreement,
9 we should leave it?

10 MR. FERNICH: We don't have a strong view. If the
11 government wants it, it's fine.

12 THE COURT: Okay. 29. Persons not on trial.
13 Generally I don't know that you really need this, but it seems
14 to me that in this case, since Ms. Giannelli was here at the
15 start and then she disappeared, I did say at the beginning I
16 instructed the jury and I said when we get to the end of the
17 case that I would again, so I think it's in order.

18 Mr. Sercarz and Mr. Fernich?

19 MR. FERNICH: You want to leave it in, you're saying?

20 THE COURT: I'm saying I want to add the same
21 instructions I gave in the beginning about Ms. Giannelli,
22 unless you think that's highlighting it. That's why I'm giving
23 you the opportunity to be heard.

24 MR. FERNICH: That's fine.

25 THE COURT: What's fine? You want me to put something

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1 in here about her or not?

2 MR. FERNICH: Yes.

3 THE COURT: And specifically mention Ms. Giannelli?
4 So in other words, at the end of the first paragraph we add
5 something back in that, as I told you at the outset of this
6 case, the fact that Ms. Giannelli was not part of the trial
7 after the first day or two --

8 MR. SERCARZ: Agreed.

9 THE COURT: Ms. Mortazavi?

10 MS. MORTAZAVI: Agreed, your Honor.

11 THE COURT: So I'm going to leave it to you to propose
12 what goes in there. It should be short. I don't think we need
13 to beat a dead horse.

14 MS. MORTAZAVI: And your Honor, our proposal would be
15 that we mimic the language that you have already delivered to
16 the jurors.

17 THE COURT: Yes.

18 MR. FERNICH: Yes.

19 THE COURT: All right. Uncalled witnesses equally
20 available. It says: If applicable.

21 MS. MORTAZAVI: The government doesn't request it.

22 MR. FERNICH: It can go out.

23 THE COURT: Okay, terrific.

24 31. Use of informants. Did we really have any
25 informants here?

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Charge Conference

1 MS. MORTAZAVI: The government doesn't request that we
2 include this instruction, given what was elicited.

3 THE COURT: Mr. Fernich and Mr. Sercarz, they're
4 comfortable getting rid of this, are you?

5 MR. SERCARZ: What's the government's opinion on this
6 one?

7 THE COURT: It's not necessary.

8 MR. SERCARZ: I agree.

9 THE COURT: You agree?

10 MR. SERCARZ: Yes.

11 THE COURT: So we'll get rid of 31 as well.

12 Charge No. 32 on testimony of cooperating witnesses.
13 At the very end you have a paragraph that says: As with any
14 witness, let me emphasize that the issue of credibility need
15 not be decided in an all-or-nothing fashion. Even if you find
16 that a witness testified falsely in one part, you may still
17 accept his testimony in other parts or may disregard all of it.

18 There's kind of a standard charge that if a witness is
19 false in one part you can consider him false in all.

20 MR. FERNICH: So Judge, Sand doesn't provide for the
21 false-in-one-false-in-all charge. We would request the charge
22 from Devitt and Blackmar which has a standard false-in-one-
23 false-in-all charge.

24 THE COURT: I'm sorry, tell me from what?

25 MR. FERNICH: The source is the other treatise when

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1 Sand doesn't have it, Devitt, D-E-V-I-T-T, and Blackmar,
2 B-L-A-C-K-M-A-R, that has a standard false-in-one-false-in-all
3 charge, which we would request. I didn't want to make a huge
4 deal out of this before.

5 THE COURT: I don't mean to make a huge deal of it
6 either, and I guess "or may disregard all of it," that's an
7 intent to capture that. But it just seems to me that, in
8 fairness, if you're going to say the first part, that you may
9 accept some of it, you should also say that you may also do the
10 flip. So I would put a period after "may accept his testimony
11 in other parts," period, and then add the something about
12 conversely, and pick up the charge.

13 MR. FERNICH: I will get it to the government.

14 THE COURT: I was going to ask you, Mr. Fernich --

15 MR. FERNICH: Yes.

16 THE COURT: -- would you mind sending it to the Court
17 as well.

18 MR. FERNICH: Not at all, I just have to dig it out.

19 THE COURT: No problem, thank you.

20 33 is use of evidence obtained in searches, and the
21 second line talks about searches of vehicles. Did we have any
22 of that in this case?

23 MS. MORTAZAVI: We did not.

24 THE COURT: That shouldn't be in here.

25 Then you did have evidence about location based on

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1 cellphones, right? That was today you talked about the call
2 that you got the location because --

3 MS. MORTAZAVI: Perhaps, your Honor, we could adapt it
4 to you have seen evidence, or there is evidence in this case,
5 because there is geolocation evidence in this matter.

6 THE COURT: That's what I'm talking about.

7 MS. MORTAZAVI: So I think if we adapt the language to
8 reflect the fact that they haven't heard it but it is in
9 evidence.

10 THE COURT: So similarly, there is evidence --

11 MS. MORTAZAVI: Yes.

12 THE COURT: -- concerning the location of individuals.
13 Is it only Dr. Fishman?

14 MS. MORTAZAVI: I think and individuals is
15 appropriate. There is geolocation that was admitted for
16 Ms. Giannelli admitted by stipulation.

17 THE COURT: So you need to -- I'm trying to conform it
18 to what actually happened, that's all.

19 MR. FERNICH: Your Honor, Mr. Sercarz will handle this
20 a few minutes so I could use the facilities.

21 THE COURT: Do you want to take a break?

22 MR. FERNICH: No, it's okay.

23 MR. ADAMS: Your Honor, to turn back to vehicles for a
24 moment, it wasn't highlighted particularly, but among the
25 photographs in Ms. Dwayne's search are photographs of the

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1 search of the truck.

2 THE COURT: So leave it in then.

3 34. Statements of a defendant. Is this applicable?

4 MS. MORTAZAVI: I believe it is, your Honor, because
5 we admitted Dr. Fishman's statements to the U.S. Attorney's
6 Office in the Eastern District of New York and the FBI there.

7 THE COURT: That's true.

8 MR. SERCARZ: I couldn't hear Ms. Mortazavi, but
9 there's a statement on a form with regard to the Delaware
10 investigation.

11 THE COURT: And she was referencing the Eastern
12 District conversations about I guess Brooks. So that's fine.
13 You need to fix the bracketed, each of the defendants.

14 MS. MORTAZAVI: Yes, your Honor.

15 THE COURT: The defendant.

16 Defendant's testimony obviously comes out, 35.

17 But we need 36 then, I assume. Right, Mr. Sercarz?

18 MR. SERCARZ: Yes.

19 THE COURT: So if asked by defendant, it's now been
20 requested. Then obviously you need to fix it about he or she
21 and all that.

22 And I just have a question for you all, why are you
23 using something from Judge Oetken? Isn't there a Sand
24 instruction on this? It seems like such a fundamental issue
25 that there must be a pattern instruction. Not that I have

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1 anything against Judge Oetken.

2 MR. ADAMS: I imagine it's embedded in the Judge
3 Oetken instruction.

4 THE COURT: If you take a look at the Sand instruction
5 and assure yourself that you're comfortable with this, that's
6 all. Whenever you start using a case specific one it makes me
7 nervous it was somehow tailored to that case, and I did not
8 take the time to go back and compare to Sand where you're not
9 referencing it.

10 37. It is the Court's understanding that the
11 recordings were admitted into evidence but the transcripts were
12 not.

13 MS. MORTAZAVI: The transcripts were admitted into
14 evidence. The clips were marked, for example, 101A and --

15 THE COURT: And these were T.

16 MS. MORTAZAVI: And these were T. And the government
17 did move those into evidence, and I believe Mr. Chow corrected
18 a few of the transcripts, the T exhibits that we had not moved
19 in. So they are in evidence.

20 THE COURT: So you have the second sentence that says
21 what I thought, the transcripts of the English language
22 recordings have been offered as aids, but if they are in
23 evidence, you should say that.

24 MS. MORTAZAVI: We will amend it, your Honor.

25 THE COURT: Because the question I had was really your

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1 next sentence about if they weren't in evidence, were they
2 entitled to have the transcripts. But they have been admitted,
3 then they're evidence.

4 MS. MORTAZAVI: And we will amend the first sentence
5 to include transcripts, and I think we can remove the second
6 sentence entirely.

7 THE COURT: Yes.

8 Number 38.

9 MR. SERCARZ: May I ask a question about that? From a
10 logistical standpoint, do I assume that in the event that the
11 jury asks either to listen to a recording or to review a
12 transcript that that will be done in open court?

13 THE COURT: Yes.

14 MR. SERCARZ: Thank you.

15 MR. ADAMS: Your Honor, with respect to listening to
16 the recording, I think we have to do it in the courtroom. With
17 respect to the transcripts, the requested transcripts, we
18 logistically should send them back if they only requested that.

19 THE COURT: If they only request a transcript,
20 Mr. Sercarz.

21 MR. SERCARZ: That was my question, and I thought
22 everyone agreed that they will get the binders here in open
23 court.

24 THE COURT: Well, they're not going to get the binder.
25 If they say "Can I see a transcript of a call on X date," they

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1 won't get the whole binder, they will get what they asked for.

2 MR. SERCARZ: Agreed.

3 THE COURT: Why can't that go back to them?

4 You can read it just like they can. It's like any
5 other piece of evidence then, isn't it?

6 MR. SERCARZ: It's unlike every piece of evidence in
7 one regard: When the jury listened to the tapes and had the
8 transcripts, each juror had one, and I am concerned that if one
9 copy of the transcript were sent back there might be some
10 unfairness in the jury's handling of that single copy of the
11 exhibit.

12 THE COURT: That's true with every single exhibit.

13 MR. SERCARZ: It's true with regard -- the potential
14 exists with regard to every exhibit, but in connection with
15 transcripts, when they had the opportunity in court, everyone
16 had their own transcript, so it's slightly different
17 circumstance.

18 THE COURT: I don't see the issue, frankly, if they
19 were admitted into evidence. My point starting was I thought
20 they were not. I thought they were aids. And the fact that
21 you said they were aids reinforced what I understood. Because
22 you had the T, I thought the T didn't go in and the recording
23 went into evidence, and my point to you was going to be then
24 they don't go back, because they're an aid, they're not
25 evidence.

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1 MR. SERCARZ: I understand.

2 THE COURT: But now you're telling me they were
3 admitted and you didn't object to their being admitted,
4 Mr. Sercarz, so I don't see what the problem is. If something
5 is an exhibit, and it is, why can't it go back to the jury?

6 MR. SERCARZ: I don't think it's an earthshaking
7 development particularly for now, but to make my point, do
8 twelve go back or does one go back?

9 THE COURT: What happens with every exhibit the jury
10 asks for? How is it any different?

11 MR. SERCARZ: If there's a drug vial or if there is
12 another document, there's only one that's offered into
13 evidence, there's only one that's been used, and if the jury
14 therefore asks to see it in the jury room, there's one and only
15 one. With regard to transcripts every juror had one.

16 THE COURT: And they were all exactly the same and
17 every juror had every exhibit on the screen at the same time.
18 If they ask for the transcript, a copy of the transcript goes
19 back, as with every other hard copy documentary exhibit. If
20 they ask to hear the recording, then we come into open court
21 and we hear it in open court.

22 MR. SERCARZ: I have your ruling, your Honor, I
23 understand.

24 THE COURT: Ms. Popper just reminded me, and I
25 mentioned to you all you're supposed to under the protocol give

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1 me a thumb drive with the exhibits. And frankly, I had a note
2 and intended to speak to everybody about this. I need to
3 confirm the Court protocol about this. I find it troubling to
4 think that we're going to give the jurors the flash drive,
5 thumb drive, whatever you want to call it, and they can have at
6 it. And if they want an exhibit they're supposed to scroll
7 through this thing and find it.

8 I understand that in the height of Covid when people
9 thought Covid could be passed on surfaces we were then limiting
10 the using of hard copy documents, everything had to be
11 electronic under the protocols then, you had to have the flash
12 drives, we had to spray every document if there was some reason
13 you had to have physical evidence, but I think we moved past
14 that. So I just need to confirm that, but it would be my
15 intention to send a hard copy back.

16 MS. MORTAZAVI: Your Honor, we join in the Court's
17 concern with simply handing over all the exhibits. I think it
18 makes good sense to have the Court maintain a copy of what has
19 been admitted and deal with requests as they come in.

20 THE COURT: I take it from all the nodding,
21 Mr. Sercarz and Mr. Fernich, you agree, right?

22 MR. FERNICH: Yes.

23 MR. SERCARZ: I do agree.

24 THE COURT: I mean that's the way we're going to
25 operate.

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1 38. Redaction. I think that there were some exhibits
2 that were redacted, correct, so this stays?

3 MS. MORTAZAVI: Correct, your Honor.

4 MR. SERCARZ: Yes.

5 THE COURT: Okay. All right.

6 39. You've heard testimony, is that true?

7 MR. ADAMS: Yes, in this the form of the Delaware
8 letter.

9 THE COURT: Sorry, Mr. Adams?

10 MR. ADAMS: At the very least in the form of the
11 Delaware letter, that includes things like --

12 THE COURT: That's true. Okay.

13 So 39 stays and there is no objection, correct?

14 MR. SERCARZ: Correct.

15 MR. FERNICH: There's no objection.

16 THE COURT: Character testimony. Comes out?

17 MR. SERCARZ: Comes out.

18 MR. ADAMS: Out.

19 THE COURT: 41. Right to see exhibits and hear
20 communications. This is the point we were just talking about.
21 So let me just read this, please.

22 This is fine as it reads because it doesn't commit one
23 way or the other, it says they will be sent to you or you will
24 be brought back, so we can deal with it when and if it happens.
25 It doesn't mention transcripts. So my only suggestion would be

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1 if you want to hear or see or see or hear any of the exhibits
2 and not add anything any more specific about the recordings.

3 MR. SERCARZ: Agreed.

4 THE COURT: I see nodding heads, yes?

5 MS. MORTAZAVI: Yes.

6 MR. SERCARZ: Yes.

7 THE COURT: Thank you. Note taking.

8 And I may modify the conclusions a little bit, but
9 they won't be about substantive things, so if I had something I
10 will let you know about that on Monday.

11 Okay. So that's the joint set with the areas of
12 disagreement dealt with, and you will all get back to me about
13 your conversations about the open items that we talked about on
14 request 10 or 11 or both.

15 MS. MORTAZAVI: Yes, your Honor.

16 MR. SERCARZ: Yes.

17 THE COURT: Thank you. Now with regard to bullet 15,
18 which is on consent, the post-bail conduct, the lesser included
19 offense, you're going to take a look at.

20 MR. FERNICH: We'll work it out with the government.

21 THE COURT: Thank you very much. Your supplemental
22 requests, I am not giving request 1.

23 MR. FERNICH: Understood. In anticipation of that, we
24 would request in the alternative the good faith charge from
25 Sand that I cited in the authority section.

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1 THE COURT: Sorry, you cited it? I didn't hear you,
2 Mr. Fernich.

3 MR. FERNICH: I cited it as authority for request 1,
4 if you see, your Honor, on what's labeled page 3, the
5 penultimate citation.

6 THE COURT: Yes.

7 MR. FERNICH: We were just request the generic good
8 faith instruction from Sand that is there.

9 THE COURT: I think the defendant is entitled to that,
10 that the defendant contends that he acted in good faith and did
11 not have an intent to defraud or mislead. And then there would
12 be an instruction on what it means.

13 MS. MORTAZAVI: Your Honor, it's hard to agree without
14 knowing what the language says.

15 THE COURT: Mr. Fernich, provide it. Okay?

16 MR. SERCARZ: Yes.

17 (Continued on next page)

1 THE COURT: And if you take a look at Lasher, I do
2 know that Judge Buchwald included a good faith charge. I mean,
3 once you agree to include the lesser-included offense, I think
4 it has to be part of this.

5 MS. MORTAZAVI: And again, it's conceptually probably
6 not an issue, but we do need to see the language.

7 THE COURT: Okay.

8 MR. FERNICH: Yes, I don't -- I expect it won't be
9 controversial. It will just come straight out of Sand without
10 reference to the facts.

11 THE COURT: Okay. Request 2 I don't think is
12 appropriate.

13 Request 3, I also do not see why you need this. If
14 we're having the lesser-included offense charge and all, or
15 what this adds to anything. I mean, you're talking about
16 unless the government proves that he intended to defraud or
17 mislead, and then we're going on and having the lesser-included
18 offense, and then it conflicts with this, and then you talk
19 about interstate commerce, and there's a separate charge on
20 interstate commerce. Is there not?

21 MR. FERNICH: Okay. Let me -- I'm not going to
22 belabor any of this. Let me just make a very brief record as
23 to all of this.

24 THE COURT: Sure.

25 MR. FERNICH: I've got your Honor's ruling on request

1 one. The Court telegraphed it already. My contention is that
2 if a jury were to find that Dr. Fishman carried on the activity
3 alleged in the indictment believing in good faith, and without
4 intent to defraud or deceive that he was engaged in the
5 practice of veterinary medicine, that a conviction in the face
6 of those facts under this statute would be -- would render the
7 statute unconstitutional, as applied to the conduct charged in
8 this case, in violation of the Fifth Amendment's right to due
9 process and fair notice, and also Tenth Amendment federalism
10 principles. That's the purpose of that request.

11 THE COURT: All right. I think you're ignoring the
12 allegations, and you're ignoring the evidence that came in,
13 that Dr. Fishman did far more than practice veterinary
14 medicine --

15 MR. FERNICH: No, no, I understand.

16 THE COURT: -- or that he didn't practice veterinary
17 medicine.

18 MR. FERNICH: I understand that, but to the extent
19 that a jury could find that he believed in good faith, albeit
20 mistakenly, that he was engaged in the practice of veterinary
21 medicine, but he was wrong about it, I think applying that --
22 this statute to that set of facts to criminalize that behavior
23 would violate the proscriptions that I've just enumerated.

24 THE COURT: Yes, but I think you're going to propose a
25 good faith charge, right?

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1 MR. FERNICH: We could argue the veterinary stuff in
2 the good faith charge, right?

3 THE COURT: Yes, okay. And I'm not shutting that
4 down.

5 MR. FERNICH: I know.

6 THE COURT: Okay.

7 MR. FERNICH: Now, No. 2 is, in my view, a much more
8 critical charge, and there is a state of -- a way of
9 interpreting this record, where a jury could find that
10 Dr. Fishman gave not a whit about FDA rules, regulations,
11 misbranding, adulteration, and all of that, and his sole intent
12 was to boost the performance of racehorses solely for purposes
13 of competitive advantage. If the jury were to find that --

14 THE COURT: May I ask you a question? I'm sorry to
15 interrupt. When you say competitive advantage, are you talking
16 about competitive advantage in horseracing --

17 MR. FERNICH: Yes.

18 THE COURT: -- or competitive advantage in the sale of
19 his product?

20 MR. FERNICH: No, no, no, in horseracing. So it's
21 exactly as I write here. I mean, frankly, it's my impression
22 from the record that that's very close to the true state of
23 affairs, but whether a jury finds that is up to them. I think
24 that this case is about -- statutorily about the adulteration
25 and misbranding of drugs.

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1 THE COURT: Correct.

2 MR. FERNICH: But, really, the -- and so that is, as
3 we all know, a public welfare statute. And what Fishman was
4 really doing, I submit, or reasonable view of the evidence
5 supports that he doesn't care about that stuff at all.

6 THE COURT: What stuff? That's not what --

7 MR. FERNICH: Adulteration, misbranding.

8 THE COURT: Correct.

9 MR. FERNICH: He doesn't care about -- it's a matter
10 of complete indifference to him, the FDA and the FDA rules and
11 regulations. What he really cares about is doping horses and
12 beating the testability regimes. That's why, when the
13 government gets up, and they're totally entitled to make the
14 argument, he wants to avoid detection at all costs.

15 And one theory of the evidence is that he wants to
16 avoid detection because he wants the horses to win; he's doping
17 horses. And, ultimately, this statute is not about the
18 competitive integrity of horseracing. That's a matter for
19 state and local racing authorities. This statute has a
20 different ambit of concern, and if a jury were to find that he
21 lacked that intent that's connected to adulterated or
22 misbranding of drugs and that the only thing he cared about was
23 doping horses to win, that's not this law.

24 It might be a wire fraud law with doping regulations
25 and state law as a predicate for the wire fraud charge. You

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1 know, that's a great way to charge a doping case, in my
2 opinion. This is a different thing, and the government said --
3 and it's a totally legitimate argument to make, I'm
4 paraphrasing -- that he was manufacturing drugs in the guise of
5 practicing veterinary medicine.

6 And one view of the evidence is that this prosecution
7 is intended -- is trying to regulate performance enhancing
8 drugs in the guise of an adulteration and misbranding public
9 welfare statute. And that's not what this is about. And
10 that's why there are these state and there are federalism
11 concerns implicated, and that's why, as your Honor wrote in her
12 pretrial ruling, that's why, subsequently, there has been a
13 civil federal regulatory statute that deals with the doping of
14 races and the integrity of horseracing; so that's an argument
15 that we could make, that the intent --

16 THE COURT: I didn't make it, and that's why I
17 addressed it in my opinion. I didn't raise it in my opinion.
18 I rejected the arguments by the defendants that the fact that
19 there is --

20 MR. FERNICH: No, that statute is not preclusive. The
21 defense argued --

22 THE COURT: Correct, and that's what I said.

23 MR. FERNICH: No way does it preclude this
24 prosecution. What I'm saying is they brought the case --

25 THE COURT: But that's what some of the defendants

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1 argued. That's why I commented on the statute; so now you're
2 conceding the correctness of -- and I don't remember whether
3 Dr. Fishman joined in that argument or not.

4 MR. FERNICH: That argument is not an argument that I
5 would have made that the defendants made. What I'm saying is
6 something -- I'm not assailing the Court's ruling at all. I'm
7 using the Court's ruling, in part --

8 THE COURT: Yes, but you're saying that I
9 affirmatively made a statement about the Horse Integrity
10 Security Act. And the only reason I addressed it was because
11 it was the grounds on which the defendants, some or all of
12 them -- perhaps including your client, I don't remember --
13 moved to dismiss.

14 MR. FERNICH: It's not an argument that holds any
15 water. Let's just put that point to one side. A jury could
16 find that Dr. Fishman -- it was a matter of FDA, all of it, it
17 was a matter of complete indifference to him, and all he cared
18 about was doping racehorses. That is not a violation of the
19 FDCA. It may violate state and local racing rules. It may
20 violate other federal statutes. It doesn't violate this one,
21 and that's why I want the charge.

22 THE COURT: Okay. So I hear all of what you're
23 saying, and I don't even necessarily disagree with some of it.
24 But I go back to what I said to you yesterday, I am not going
25 to charge the jury on what a statute does not do or what is not

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1 charged in the complaint. You can certainly argue that in your
2 summation, but I'm not going to charge that --

3 MR. FERNICH: Okay.

4 THE COURT: -- any more than I'm not going to charge
5 the government's theory of the case.

6 MR. FERNICH: Well, Judge, we're on different footing
7 than the government, and I take your Honor's point. In a
8 criminal case, if we -- we're entitled to a defense theory
9 charge if it accurately states the law and conveys our theory,
10 and this is one of our theories. I mean, this is dense obtuse
11 material, and a lot of stuff is being thrown at them, and I'm
12 just trying to put myself in the shoes of a regular juror.

13 THE COURT: All right. I'm not giving request 2.

14 MR. FERNICH: Okay. Got it.

15 THE COURT: I find it completely misleading and --

16 MR. FERNICH: Okay.

17 THE COURT: -- I'm not giving it.

18 MR. FERNICH: Understood.

19 THE COURT: We're on No. 3. Why do we even need this?
20 It conflicts with your own request for a lesser-included
21 offense charge.

22 MR. FERNICH: Well, not exactly.

23 THE COURT: You may not convict him of the felony.
24 Okay. You add "the felony" label, which the other problem I
25 have with that is are you trying to subtly introduce concepts

1 of punishment?

2 MR. FERNICH: No, not at all.

3 THE COURT: But that's what you're doing. And then
4 you're talking to interstate commerce, which has its own
5 separate charge, and you're talking to intent to defraud or
6 mislead, which has its own separate charges, and now has the
7 lesser-included offense charge that you asked for. So I'm not
8 seeing what No. 3 even adds.

9 MR. FERNICH: I'll explain it. Okay? This goes to
10 the argument that we began addressing a little bit earlier, and
11 it goes to the argument that the government raised in the
12 pretrial motions and that your Honor said, rightly, that the
13 Court didn't need to decide back then.

14 The government is pressed -- the government's view is
15 that any intent to defraud or mislead suffices to satisfy the
16 statute, and I'm saying that it has to be by the plain language
17 of the statute, plain reading of section 333(a), that the
18 intent to defraud has to be in connection with the offenses
19 charged in 331; i.e. an intent to defraud or mislead
20 authorities connected to the dissemination in interstate
21 commerce of adulterated or misbranded drugs.

22 That's what this statute charges, and the
23 unconstrained view that any intent to defraud or mislead
24 suffices would run into the problem that I've -- and this is
25 basically in common parlance, on lawyer's parlance a nexus

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1 requirement. I think it's supported by the plain language of
2 the statute, and it's supported by these myriad authorities
3 that I've cited here in other white-collar criminal case
4 context.

5 THE COURT: Okay. I understand your point, which I
6 did not understand from this. If you want to propose language
7 that the intent to defraud or mislead must, in some way, be
8 connected to the misbranding --

9 MR. FERNICH: Yes.

10 THE COURT: -- I'll consider it. That's not what this
11 says to me.

12 MR. FERNICH: Okay. I'll redo it. I tried to be
13 fair. That's why the "in connection with" that's the key
14 language.

15 MS. MORTAZAVI: Your Honor --

16 MR. FERNICH: In connection with disseminating
17 interstate commerce or causing to be so disseminated,
18 adulterated or misbranded drugs. That's the only thing I'm
19 trying to do here.

20 THE COURT: Okay. I told you I now understand what
21 you're trying to do, but this, to me, is totally confusing.

22 MR. FERNICH: I didn't want to say, Judge, that they
23 must acquit, straight up, because they could get a conviction
24 on the lesser-included offense. That's all I was trying to say
25 by the use of the word "felony," if that defense won't work on

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1 the misdemeanor, that's all.

2 THE COURT: The point is, back to my suggestion, back
3 when we were talking about the definition of an intent to
4 defraud or mislead, if you want to propose some language about
5 the fact that that intent to defraud or mislead has some how
6 been connected to --

7 MR. FERNICH: That's all.

8 THE COURT: -- the charged offense, propose something
9 like that.

10 MR. FERNICH: That's in --

11 THE COURT: I said propose it.

12 MR. FERNICH: I'll propose to put it into the extant
13 defense charge. That's the sole purpose of this proposal.

14 THE COURT: So propose it to Ms. Mortazavi. Let her
15 look at it, and if you put that simple sentence in there, that
16 might take care of what you're trying to do, without creating
17 this whole other concern I have.

18 MR. FERNICH: Okay.

19 THE COURT: All right. Fair enough, now that I
20 understand what you're trying to do.

21 And request No. 4 now is going to be superseded by
22 whatever you're agreeing to, right?

23 MR. FERNICH: Yes, correct.

24 MS. MORTAZAVI: Correct.

25 THE COURT: Okay. So request 4, in your submission of

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1 supplemental defense requests to charge, is withdrawn.

2 MR. FERNICH: Yeah, we're going to consolidate it with
3 what Ms. Mortazavi and the defense is working on. We're almost
4 there.

5 THE COURT: Okay. Anything further?

6 MS. MORTAZAVI: Nothing from the government, your
7 Honor. I imagine you would like to see a copy of this tomorrow
8 morning?

9 THE COURT: As soon as you can do it.

10 MS. MORTAZAVI: All right.

11 THE COURT: I mean, I'm not going to be unreasonable
12 about this. It's lousy out, and it's going to get more lousy
13 out; so as soon as you can do it.

14 MS. MORTAZAVI: Thank you.

15 THE COURT: If you can do it at some point in the day
16 tomorrow, that would be fantastic.

17 MR. FERNICH: We'll deal with it.

18 THE COURT: All right. Thank you, all. I appreciate
19 it, and I do appreciate that, by and large, you have been
20 working cooperatively. I really do.

21 MR. FERNICH: They're great to work with, your Honor.

22 THE COURT: All right. Thank you all then. Anything
23 else on any other subject from anybody? Ms. Mortazavi?

24 MS. MORTAZAVI: Nothing further, your Honor.

25 THE COURT: Defense?

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1 MR. SERCARZ: No. Thank you, your Honor.

2 THE COURT: So let me just ask you a couple of quick
3 questions, then. Without, you know, pinning anybody down, do
4 you have a sense of how long we need for summations?

5 MS. MORTAZAVI: For the government, it may be an hour,
6 or an hour and a half, your Honor, but that will --

7 THE COURT: Okay. And is that for both your summation
8 and your rebuttal?

9 MS. MORTAZAVI: That is just for summation, and I'll
10 turn to Mr. Adams for an estimate of rebuttal.

11 MR. ADAMS: Roughly a half hour.

12 THE COURT: Okay. And for the defense?

13 MR. SERCARZ: An hour, and I'll try and do it more
14 briefly.

15 THE COURT: All right. Look, as I say, I'm not
16 constraining anybody. I'm just trying to anticipate how Monday
17 is going to unfold. I'd like, if there's any way possible, for
18 us to do this -- for us to be ready to start with the jury at
19 9:30, that's when they -- what time did we ask them to be back,
20 Ms. Dempsey?

21 MR. SERCARZ: Your Honor, you told them 10:00.

22 THE COURT: Oh, terrific. I thought ahead. So that
23 gives us a little bit of time, if we need it, on Monday
24 morning, but because I want to give the jurors a hard copy of
25 the charge -- I think I said that to you all, right?

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1 MS. MORTAZAVI: Yes.

2 THE COURT: Okay. I just think this is so long and so
3 dense, I'm generally not in favor of it, but I think here it
4 would facilitate things, and you all said you're in agreement;
5 so --

6 MR. FERNICH: We have no objection to that.

7 THE COURT: So why don't we plan to meet at 9:00. If
8 there are things we need to discuss, we'll do that. We'll take
9 care of it. We'll be ready to go at 10:00 with the charge.
10 Even as lengthy as it is, we'll certainly be finished before
11 lunchtime. I am open to your thoughts.

12 As a practicing lawyer, I would not want to be
13 interrupted once I start; so if we finish the charge at 11:00,
14 11:30 --

15 MS. MORTAZAVI: Your Honor, is your intention to first
16 charge the jury and then have summations?

17 THE COURT: I'm sorry. What am I talking about? No,
18 of course not. Yes, you're right, you're right.

19 MS. MORTAZAVI: All right.

20 THE COURT: I wanted you to know the charges so that
21 when you do your summations, you have the benefit of it.

22 MS. MORTAZAVI: Yes.

23 THE COURT: I'm sorry. So you're right. We'll start
24 with your summation then at --

25 MS. MORTAZAVI: At 10:00 a.m.

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1 THE COURT: -- at 10:00 a.m.

2 MS. MORTAZAVI: Very good.

3 THE COURT: And then you'll be finished by 11:30, at
4 the latest.

5 MS. MORTAZAVI: Correct.

6 THE COURT: And you could go until 12:30, if need be.

7 Then, Mr. Adams, do you want to keep going or --

8 MR. ADAMS: I'll take a lunch break. At that point,
9 they will probably need it anyway.

10 THE COURT: Yes, I think jurors can't listen that
11 long. So that's what I would propose we do then, but I don't
12 know, obviously, we're going to have to be flexible. As
13 Mr. Fernich has said, trials are fluid, and depending on what
14 happens and how the timing works, it may be the jury wants a
15 break after the government's summation, before Mr. Sercarz
16 starts, and then I'm not going to time it so that you get
17 interrupted, Mr. Sercarz, obviously.

18 So we'll play it by ear, but that will be the
19 tentative game plan, that we'll get the first, your summation,
20 then your summation, Mr. Sercarz. We'll break for lunch.
21 We'll have Mr. Adams' summation, then I'll charge the jury, and
22 then we will let them retire and begin deliberating.

23 MS. MORTAZAVI: Very good.

24 THE COURT: Okay? I think I mentioned I'm going to
25 add a foreperson charge. If I didn't say that, I should have.

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1 It's missing here. Ms. Popper, can you -- oh, right, and a
2 charge on discharging, releasing the alternates. So we really
3 should talk about that.

4 It's my intent to release all four alternates, but to
5 ask them to please not talk about the case, and Ms. Dempsey has
6 their contact information, and tell them that it could develop
7 that we might have to ask some of them to come back.

8 MR. ADAMS: Absolutely.

9 THE COURT: And then the foreperson, it is my intent
10 to designate the juror in seat one, I don't even know who that
11 is, as the foreperson. Some judges send them back to vote, but
12 personally I don't want them wasting half a day on voting for
13 the foreperson.

14 MR. ADAMS: Good.

15 THE COURT: Any objection?

16 MR. SERCARZ: No, your Honor.

17 THE COURT: All right. Terrific then. Thank you,
18 everybody. Have a good weekend, and hopefully the storm won't
19 be so bad.

20 MR. ADAMS: Thank you, your Honor.

21 MS. MORTAZAVI: Thank you, your Honor.

22 MR. FERNICH: All right.

23 (Adjourned to January 31, 2022, at 9:00 a.m.)
24
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